Supreme Court, U.S.
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No. _____ 95 177 JUL 28 1995

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In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

v.

STATE OF GEORGIA,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia
(Three Judge Court)

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTIONS PRESENTED

1. Whether, given the failure of the United States to appeal the decision of the three judge court granting preclearance under Section 5 of the Voting Rights Act to a state's proposed voting changes, the court erred in denying a motion by minority voters for leave to intervene for purposes of pursuing an appeal, where the minority voters had previously sought leave to intervene prior to trial, were allowed to participate as *amici*, and were directly affected by the changes?

2. Whether in preclearing state statutes creating new superior court judgeships the district court erred in refusing to consider whether the pre-existing method of electing the judges was infected with a racially discriminatory purpose?

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TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

v. *Appellants,*

STATE OF GEORGIA,

Appellees.

On Appeal From The United States District Court For The District Of Columbia (Three Judge Court)

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the three judge district court granting preclearance to the State of Georgia's creation of 62 elective judgeships entered on February 3, 1995 is reported at 881 F.Supp. 7 and appears in the appendix hereto at App. 1. The order of the district court denying appellants' motion to intervene as parties defendant entered on April 4, 1995 is unreported and appears at App. 20.

JURISDICTION

The judgment and order of the three judge court was entered on February 3, 1995. Appellants' motion to intervene as parties defendant for purposes of appeal was filed on March 6, 1995, and was denied on April 4, 1995. Appellants filed their notice of appeal on June 1, 1995. *See* App. 22. This appeal is being docketed in this Court within 60 days after filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(b).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in the case are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, the pertinent texts of which are set out at App. 24-7.

STATEMENT OF THE CASE

A. The Proceedings Below. The State of Georgia brought this action in the District Court for the District of Columbia seeking preclearance of 62 statutes enacted during March 1967 to April 1992 creating or extending 62 new superior court judgeships. App. 3, 6. The superior court is the state's trial court of general jurisdiction. Ga. Const. art. VI; Ga. Code Ann. title 15. In a prior related case a three judge court for the Southern District of Georgia ruled that the statutes at issue were subject to preclearance. *Brooks v. State Board of Elections* ["*Brooks*"],

775 F.Supp. 1470, 1477-80 (S.D.Ga. 1989), *aff'd*, 498 U.S. 916 (1990). After an administrative submission, the Attorney General objected to the voting changes under Section 5. *Brooks v. Georgia State Board of Elections*, 790 F.Supp. 1156, 1158 (S.D.Ga. 1992). This litigation followed.

Appellants are black citizens and registered voters of Georgia, and are the plaintiffs in *Brooks*. In *Brooks*, they challenged the state's failure to secure preclearance for the disputed judgeships under Section 5 as well as the method of electing judges under Section 2 of the Voting Rights Act. *Brooks v. State Board of Elections, supra*, 775 F.Supp. at 1472. Appellants' Section 2 claim is pending in the local district court.

Some of the appellants are also members of the Georgia General Assembly and have introduced or supported legislation to abolish the existing method of electing superior court judges in favor of alternative methods such as subdistricts or limited voting. DT, Holmes at 3-4; U.S. Exs. 69, 169 (Vol. II), 80, 126.[1] Appellants have been the principal advocates of a change in the method of electing superior court judges in Georgia to provide blacks an equal opportunity to elect candidates of their choice.

Appellants sought leave to intervene in this action prior to trial but were allowed to participate only as *amici*. Intervention was denied on the ground that appellants' interests were adequately represented by the

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[1] The three judge court required the direct testimony to be presented in written form, with the witnesses being subject to cross-examination at trial. The direct testimony is denoted "DT" and trial testimony is denoted "T."

Attorney General of the United States who was the party defendant. Both in their motion to intervene and at trial as *amici* appellants urged the court, as did the United States, to deny Section 5 preclearance to the state's submissions.

On February 3, 1995, following a bench trial, the three judge court in a 2-1 decision granted declaratory judgment for the State of Georgia. On the 30th day after the decision, March 6, 1995, appellants filed a Motion to Intervene as Parties Defendant for Purposes of Appeal pursuant to Rule 24(a)(2) and (b)(2), F.R.C.P., together with a notice of appeal to this Court. On the same day, the United States filed a notice of appeal from the February 3, 1995 order granting preclearance. On April 4, 1995 the three judge court denied appellants' motion to intervene on the ground that in light of the notice of appeal filed by the United States it lacked jurisdiction over the motion. App. 20-1.

On June 1, 1995 appellants filed a notice of appeal to this Court from the judgment of the three judge court entered on April 4, 1995 denying their motion to intervene as parties defendant for purposes of appeal. The United States filed a motion to dismiss its appeal on June 5, 1995, the last date on which its jurisdictional statement would have been timely.

B. Statement of the Facts. There are 46 judicial circuits in Georgia of varying size and population. Each circuit contains one or more counties and a specific number of superior court judges. Blacks are 27% of the total population and 25% of the voting age population of Georgia. Pl.Ex. 89. Each of the state's judicial circuits has a majority white voting age population. Pl.Ex. 90.

Judges of the superior court are elected circuitwide in non-partisan contests to four year terms. A majority vote requirement is in effect. In multi-judge circuits, candidates are required to run for specific numbered posts. Elections are held at the same time as the statewide primary. The winners are placed on the general election ballot where they run unopposed, except for write-in candidates. App. 4 and n.2.

The statutes at issue in this case added from one to six judges to 30 different circuits over a 25 year period. Forty-eight of the new judgeships were implemented without preclearance. Pl.Ex. 1. The implementation of 14 of the judgeships was enjoined in *Brooks*.

The first black to serve as a superior court judge was Horace Ward who was appointed to the Atlanta Circuit in 1977. T, Katz at 205; Pl.Ex. 83. At the time of trial, there were more than 140 superior court judges, of whom eight were black. Seven of the eight were initially appointed to office. Pl.Exs. 1, 83. No black has ever served as a superior court judge in 40 of the state's 46 circuits. DT, Katz at Tab 9; T, Katz at 213-6. Despite strong support from black voters, no black has ever been elected to the superior court outside Fulton County in an open-seat contest or a contest against a white incumbent. DT, Lichtman I at 14-5; Pl.Ex. 83. No black has ever served on the superior court outside of the Atlanta Circuit without first having been appointed to that position. Pl.Ex. 83.

1. The Majority Vote Requirement. There was a substantial amount of evidence presented at trial, which the district court refused to consider, that the majority vote requirement pursuant to which judges are elected

was adopted with a racially discriminatory purpose.[2] A statewide majority vote requirement (H.B. 117) for local, state, and federal elections, including judicial elections, was first introduced into the general assembly in 1963 by Rep. Denmark Groover. At that time, local Democratic party executive committees determined whether elections would be by majority or plurality vote, with both methods being about equally used. DT, Kousser at 4-5.

Groover was widely quoted in the press as saying that a majority vote requirement was needed to prevent "Negroes and other minorities" or "Negro bloc voting" from controlling the outcome of elections. DT, Kousser at 67. On the floor of the house, he made the same racially based arguments in favor of passage of the bill, claiming that it would reduce the influence of "the Negro bloc vote." *Id.*, at 9, 72-3. Groover also argued that a majority vote requirement would restore the "protection" which had been removed with the invalidation of the county unit system in *Gray v. Sanders*, 372 U.S. 368 (1963), a method of nomination in the primary elections which gave controlling power to sparsely populated rural counties and restricted the voting strength of blacks in the urban areas of the state. *Id.*

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[2] Two challenges to the majority vote requirement are presently pending in the District Court for the Northern District of Georgia, Brooks v. Miller, Civ. No. 1:90-CV-1001-RCF (N.D.Ga.), and United States v. Georgia, Civ. No. 1:90-CV-1749-RCF (N.D.Ga.). In Brooks v. Miller the court denied plaintiffs' motion for a preliminary injunction against further use of the majority vote rule on the grounds that the motion had been filed on the eve of the 1990 elections and was untimely. Order, July 17, 1990.

James Mackay, a member of the house in 1963 and a former member of the U.S. Congress from Georgia, confirmed that Groover made open appeals to race in urging members of the house to support the majority vote bill. According to Mackay, "Mr. Groover gets up and says . . . we have got to go to the majority vote because . . . the Negroes and the pressure groups and special interests are going to manipulate this State and take charge if we don't go for majority vote." T at 513-4. Mackay testified that the majority vote provision would not have passed the house except for its potential to dilute the voting strength of black voters. DT at 3-4.

After passage in the house by a vote of 133 to 41, the bill was sent to the senate. The Senate Rules Committee initially voted a "do not pass" resolution. DT, Kousser at 72. In an effort to revive the bill, Groover appeared before the committee and once again made open racial appeals in urging consideration and passage of the majority vote requirement. He advised the committee that the federal government had "interceded to increase the registration of Negro voters," and that a majority vote rule would "prevent the election by plurality vote of a candidate supported only by . . . a bloc vote group." *Id.*, at 73. The committee withdrew its resolution, but the bill did not come to the floor during the remaining two weeks of the legislative session.

The Election Law Study Committee (ELSC), an advisory body authorized by the legislature in 1963 to propose a recodification of the state's election laws, included a majority vote provision in a proposed new code it drafted in the fall of 1963. U.S. Ex. 169, Minutes, ELSC, October 15-6, 1963. In preparing the initial draft of the

code, the ELSC used the Pennsylvania election code as its "guide." U.S. Ex. 169, Minutes, ELSC, August 27, 1963. The Pennsylvania code, however, contained a plurality – not a majority – vote requirement. DT, Kousser at 75.

There was evidence of racial purpose in the general deliberations of the ELSC. During the time it approved the majority vote requirement, the committee voted to remove the state's existing literacy test for voter registration but to prohibit all assistance to voters, except for those who were physically disabled. U.S. Ex. 169, Minutes, ELSC, October 15-6, 1963.

Ben Fortson, at that time Georgia's Secretary of State and a member of the ELSC, explained in a letter to the probate judge of Burke County, who had complained that repeal of the literacy test would "throw the flood gates wide open to the ignorant and uninformed," that the purpose of the proposal was to preempt a federal court challenge to the literacy test and "attempt to try to set up something that would help us protect ourselves . . . I would not be for the proposal at all if the penalties attached [for assisting voters] would not result in an honest election honestly counted and if it would not prevent block-voting by any group." DT, Kousser at 54.

Eugene Cook, the state's Attorney General and another member of the ELSC, was an initial supporter of the attempt to recast the literacy test into a supposedly more acceptable form. He changed his vote, however, because "[i]t was our thought originally that this gesture would insulate us against federal court suits . . . Upon further study, however, I perceive that it takes no great degree of sophistication to discern that this is a mere play

on words." DT, Kousser at 79. Both Fortson and Cook supported the literacy test drafted in 1957 by an earlier ELSC, of which they were members, and which was enacted by the general assembly in 1958. *Id.*, at 56-8.

The new election code was considered by the legislature during a special two month session in 1964. The majority vote requirement, which was identical in substance with Groover's H.B. 117 that had been approved by the house, passed both the senate and house with no separate roll call on the measure. DT, Kousser at 4-5.

Leroy Johnson, the first black elected to the state legislature since Reconstruction, testified that "[t]here is no question in my mind that Denmark Groover's 1963 bill was a direct precedent for the statewide majority vote requirement adopted as part of the election code in 1964." DT, Johnson at 6; T, Johnson at 649, 668-9. According to Senator Johnson,

> many white members of the General Assembly favored adoption of a statewide majority vote requirement as a method of diluting minority voting strength. This purpose was evident among some of my colleagues in the state senate, but it was particularly true in the house . . . Many of them had been advocates of the county unit system and resented its abolition by the federal courts. They saw the runoff system as a way of minimizing the effects of increased black voter registration.

DT, Johnson at 7-8.

The general assembly not only adopted the majority vote requirement in 1964, but at the same time it re-

enacted the discriminatory literacy test as well. The senate, on motion by Senator Johnson, voted to reduce the number of questions asked of residents seeking to register based on their "good character and understanding" as an alternative to literacy from 30 to six. The house voted to adopt a test containing 20 questions, but raised the grade necessary to pass from 67% to 75% correct answers. The house version was adopted by the general assembly. Milton Carlton, the senate floor leader and a witness for the state, conceded that the 1964 election law carried forward the racially discriminatory effect of the existing literacy test. DT, Carlton at 39-40.

More than 50 of the 60 statutes creating additional judgeships incorporated by express reference the at-large, majority vote and designated post method of elections provided by state law. Pl.Exs. 21-4, 27-30, 32-62, 65-70, 72-4, 76-82. While the majority vote requirement has not resulted in the defeat of a black judicial candidate who won in the primary only to lose in the runoff, blacks have been defeated for other offices by operation of the state's majority vote requirement. Of the 192 black/white runoffs for county office from 1970 through 1992, blacks won the primary only to lose the runoff 40 (21%) times. By contrast, blacks came in second in the primary and won the runoff only 18 (9%) times. DT, Maggiotto at 22-3, Tab 4, T, at 405-13. There was also evidence that the majority vote requirement has deterred blacks from running for judicial office. DT, Douglas at 5; DT, Brooks at 3-4; DT, Irvin at 33-4; T, Irvin at 1203-4, 1214-5.

Appellant Brooks, with the support of other black legislators, introduced legislation to repeal the majority vote rule and require only a plurality vote for nomination

or election. The legislation never made it to the floor for a vote. U.S. Exs. 126, 169 (Vol. II); DT, Holmes at 3.

The legislature did, however, pass a bill in 1994 abolishing the majority vote requirement for general elections and substituting a 45% plurality vote requirement. The bill was enacted following the defeat of Democratic incumbent U.S. Senator Wyche Fowler in a general election runoff by Republican challenger Paul Coverdell. The purpose of the bill was widely acknowledged to be to prevent future Republican runoff victories in the general election. DT, Irvin at 17-8, 22-6, 38; T, Irvin at 1195, 1197, 1209. The Attorney General objected to the bill under Section 5 on the ground that the state failed to meet its burden of proving the absence of discriminatory purpose in not applying the plurality requirement to partisan primaries and judicial elections. U.S. Exs. 112, 119, 214.

2. **Discrimination in Georgia**. The state has a long history of discrimination in all areas of life, particularly in voting, which has been detailed in numerous decisions of the federal courts. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *Rogers v. Lodge*, 458 U.S. 613, 624 (1982); *Gray v. Sanders, supra*, 372 U.S. at 376-81; *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1982). In *Johnson v. Miller*, 864 F.Supp. 1354, 1379 (S.D.Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 63 U.S.L.W. 4726 (1995), the three judge court took judicial notice that "[f]rom the state's first Constitution – which barred blacks from voting altogether – through recent times, the state has employed various means of destroying or diluting black voting strength." *Id.*, slip op., Statement of Judicial Notice.

The 1960s, during which the majority vote requirement was enacted, were a time of particular racial ferment in Georgia. In 1962 the general assembly met in special session to comply with the decision in *Toombs v. Fortson*, 205 F.Supp. 248 (N.D.Ga. 1962), and redistrict the senate. Despite the fact that the state constitution mandated single member districts, the legislature passed a law requiring the at-large election of senators in counties which were entitled to more than one senator. DT, Kousser at 63. The reason for requiring at-large elections was to insure that no black would be elected from a single member district in one of the populous urban counties of the state. DT, Kousser at 65.

Frank Twitty, house floor leader and one of the chief spokesmen for the at-large requirement, repeatedly urged his colleagues to support the measure because without countywide elections a black would almost certainly be elected to the senate from Fulton County. DT, Kousser at 65. Those active in politics understood that due to the prevalence of racial bloc voting in the state at-large elections made it more difficult for blacks to win public office. DT, Johnson at 3.

A lawsuit challenging the at-large provision was filed in state court, and the judge ruled that the state constitution required single member districts for all senate seats. DT, Kousser at 65. Leroy Johnson ran for a single member senate seat in Fulton County and was elected. DT, Johnson at 4.

Between 1974 and 1990 vote dilution lawsuits were filed against 40 cities and 57 counties in the state challenging their systems of at-large elections. McDonald,

Binford, and Johnson, "Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 81 (eds. Davidson and Grofman, 1994). All but one of the cities, and 53 of the counties, changed to district systems containing majority black districts as a result of the litigation. *Id.* at 100.

Through the mid-1960s no public or private institutions in Georgia would admit blacks into law school. State law required schools to be racially segregated, and provided for the cut-off of state funds to any school which admitted blacks. Ga. Laws 1956, pp. 756-64. DT, Johnson at 1; DT, Hollowell at 1-2; DT, Engstrom at 9, para. 18; *Holmes v. Danner*, 191 F.Supp. 394 (M.D.Ga. 1961).

Successful lawsuits challenging the systematic exclusion of blacks from jury service were brought in numerous judicial circuits including Alcovy, Atlanta, Atlantic, Augusta, Chattahoochee, Coweta, Dougherty, Flint, Macon, Middle, Northern, Ocmulgee, Ogeechee, Pataula, South Georgia, Southwestern, Tifton, Toombs, and Waycross. DT, Hollowell at 7. Racial segregation in prisons and jails was not abandoned until the practice was declared unconstitutional in *Wilson v. Kelley*, 294 F.Supp. 1005 (N.D.Ga. 1968).

3. **Racial Bloc Voting**. Substantial evidence was introduced – also ignored by the district court – of racial bloc voting and political cohesion. In 12 black/white elections for superior court in the circuits at issue, the average rate of black support for black candidates was 80% and the average rate of white support for white candidates was 74%. DT, Lichtman I at 10 and Table 1. In

more than 400 statewide, Congressional, countywide, and other judicial elections participated in by the voters of the counties within each circuit (so-called exogenous elections) there was a pattern of strong black voter cohesion with at least 70% of blacks supporting black candidates more than 80% of the time. DT, Lichtman I at 12, Appendices I and II.

Black candidates were defeated in 7 of the 10 open-seat and white incumbent contests from 1968 to 1994. T, Maggiotto at 376-7; DT, Lichtman III at 6. Recent judicial elections in Georgia have been characterized by racial campaign appeals. DT, Benham at 7-8; DT, Cooper at 8.

C. The Decision of the Three Judge Court. The three judge court ruled in a 2-1 decision that the disputed judgeships were created to compensate for increased caseload and not for any racially discriminatory purpose, and that neither the decision to add new judgeships nor the method of electing the judges circuitwide by majority vote were "retrogressive." App. 7, 12.[3] In reaching this conclusion, the court refused to consider whether the majority vote requirement, pursuant to which the new judges were elected, was enacted with a discriminatory purpose because it "was in force on November 1, 1964, the Act's effective date." App. 18.[4]

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[3] The United States conceded that the creation of additional judgeships was "not retrogressive with respect to minority voting strength, as that term has been construed by the Supreme Court in *Beer v. United States*." App. 11-2.

[4] The court also refused to consider whether the method of electing the additional judges circuitwide pursuant to majority vote and numbered post requirements resulted in discrimination within

Judge Johnson dissented. She reserved the right to file a dissenting opinion, but has not done so. App. 2-3.

THE QUESTIONS ARE SUBSTANTIAL

I. The Court Erred in Denying Intervention

Both this Court and lower federal courts have allowed post-judgment intervention by non-parties for purposes of pursuing an appeal. *Bryant v. Yeilen*, 447 U.S. 352, 366-7 (1980) (allowing intervention for purposes of appeal after the plaintiffs declined to appeal from an adverse decision); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 n.16 (1977) (allowing intervention and approving a line of cases allowing post-judgment intervention for purposes of appeal); Wright, Miller & Cooper, *Fed. Prac. & Proc. Jurisdiction 2d* § 3902.1 ("[m]any cases establish that intervention can be sought in the district court for the purpose of appealing a judgment that has an adverse effect on the intervenor").

Appellants satisfy the requirements for intervention for purposes of appeal. Rule 24(a), F.R.C.P., grants the right to intervene when: (1) the application is timely; (2) the movant asserts an interest in the subject of the action; (3) the interest may be impaired by disposition of the action; and, (4) the interest is not adequately represented by the existing parties. Rule 24(b) allows permissive

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the meaning of Section 2 on the ground that Congress did not intend for Section 2 standards to apply to Section 5 preclearance. App. 13. The correctness of that ruling is not an issue presented in this appeal.

intervention when the application is timely and the movant's claims or defenses and the main action have a question of law or fact in common.

The motion to intervene was filed within the time for filing a notice of appeal by a party and was therefore timely. *See United Airlines, Inc. v. McDonald, supra,* 432 U.S. at 396 (motion by non-party to intervene for the purpose of appealing is timely if filed "within the time period in which the named plaintiffs could have taken an appeal"). Appellants have asserted a number of interests in the subject matter of the action which satisfy Rule 24. As black citizens and registered voters of Georgia whose voting rights are adversely affected by the expansion of the superior court judiciary under an at-large, majority vote, numbered post voting structure, appellants have a claim or interest in the outcome of this lawsuit. In addition, their claims and the main action have both questions of law and fact in common, *e.g.*, whether the existing method of elections results in discrimination or is infected with a racially discriminatory purpose in violation of Section 5, as well as Section 2 of the Voting Rights Act.

Appellants are also plaintiffs in a lawsuit filed in the Southern District of Georgia challenging the existing method of electing superior court judges on vote dilution grounds under Sections 2 and 5. *Brooks v. State Board of Elections, supra.* But for *Brooks,* this action would never have been brought. As plaintiffs in *Brooks,* and as *amici* in this case, appellants are suffering particularized injury from the order they seek to reverse that would be avoided if their appeal succeeds. Their special interest in this litigation, which is substantially more than "only a

generalized grievance against allegedly illegal governmental conduct," *United States v. Hays*, 63 U.S.L.W. 4679, 4681 (1995), satisfies Rule 24, as well as any applicable standing or case or controversy requirements of Article III. *Diamond v. Charles*, 476 U.S. 54, 68-70 (1986); *Bryant v. Yellen, supra*, 447 U.S. at 368; *Yniquez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) (citizens group and its spokesperson who had sponsored and campaigned for a ballot initiative had an "added interest" that conferred standing to intervene for purposes of appeal); *Newport News, etc. v. Peninsula Shipbuilders*, 646 F.2d 117, 123 (4th Cir. 1981) (a district court's rejection of an *amicus's* contentions gives it an appealable interest).

Some of the appellants, as discussed above, are members of the state legislature and have sought to change the existing method of judicial elections. They have a particularized interest in the subject of the litigation for purposes of Rule 24(a), and a sufficient stake in the outcome to satisfy independently the standing and case or controversy requirement of Article III of the Constitution. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state senators who voted against ratification of a federal constitutional amendment had standing to challenge the authority of the state lieutenant governor to cast the deciding vote in favor of the amendment).

The outcome of this appeal may as a legal and practical matter impair or impede appellants' ability to protect their interests. While Section 5 preclearance does not preclude a Section 2 challenge to the judgeships, the burden of proof, which is on the submitting jurisdiction under Section 5, shifts to plaintiffs in a Section 2 proceeding. Moreover, the state will doubtlessly argue that a

presumption of validity attaches after an election system receives judicial preclearance. Conversely, a reversal of the order of the district court would likely result in a resolution of the entire litigation, and avoid the necessity of proceeding in *Brooks* under Section 2.

At the time of the district court's order denying intervention, appellants' interests were ostensibly being represented by the United States. Now that the United States has dismissed its appeal, appellants' interests are not being represented *at all* on appeal. As a general matter, the burden of showing inadequate representation "should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). No representation on appeal constitutes inadequate representation as a matter of law.

II. The Existing Method of Electing Judges Is Infected with a Racially Discriminatory Purpose

As a general matter, this Court has frequently noted the tendency of a majority vote requirement to contribute to minority vote dilution in jurisdictions where voting is racially polarized. *White v. Regester*, 412 U.S. 755, 766 (1973) (a majority vote requirement enhances "the opportunity for racial discrimination"); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) ("[i]n the context of racial bloc voting . . . the rule would permanently foreclose a black candidate from being elected to an at-large seat"). More specifically as relates to Georgia, in *City of Rome v. United States*, 446 U.S. 156, 183-4 (1980), the Court denied Section 5 preclearance to a number of voting changes proposed by Rome, Georgia in part because a

1966 change to a majority vote requirement "significantly decreased" the electoral opportunities of blacks. And in *Rogers v. Lodge, supra,* 458 U.S. at 627, the Court struck down at-large elections in Burke County, Georgia as being intentionally discriminatory in violation of the Fourteenth Amendment in part because the 1964 statewide majority vote requirement – the same provision involved in this appeal – operated "to submerge the will of the minority" and "deny the minority access to the system."

In this case, unlike in *Rogers v. Lodge, supra,* there is no need to infer racial purpose in the use of the challenged method of elections from the *effect* or operation of the majority vote requirement. Here, the evidence of purposeful discrimination was direct and undeniable. There was proof that the majority vote requirement was enacted intentionally to dilute minority voting strength.[5] The method of electing the additional superior court judges utilizing the majority vote requirement is therefore the product of intentional discrimination and for that reason violates the "purpose" prong of Section 5. *City of Richmond v. United States,* 422 U.S. 358, 378-9 (1975) (a voting change motivated by race "is forbidden by Section 5").

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[5] As noted *supra,* there was also substantial evidence of historical discrimination and the political reality surrounding enactment of the majority vote requirement which corroborate the more direct evidence of discrimination. Rogers v. Lodge, *supra,* 458 U.S. at 625 ("[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination").

The use of the majority vote requirement in the election of judges also violates the Fourteenth Amendment since the statute was enacted with an "impermissible racial motivation." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (invalidating an Alabama felon disfranchisement law enacted in part with a discriminatory purpose). The unconstitutionality of the existing system furnishes an independent basis for denial of preclearance, for as the Court held in *Beer v. United States*, 425 U.S. 130, 141 (1976), a voting practice would be objectionable under Section 5 without regard to its retrogressive effect if it "so discriminates on the basis of race or color as to violate the Constitution."

Because Section 5 contains both a purpose and an effect standard, proof that a discriminatory purpose was a motivating factor in the decisionmaking process precludes a voting change from being precleared, regardless of the actual effect of the change. *City of Richmond v. United States, supra*, 422 U.S. at 378-9 (Section 5 prohibits use of a purposefully discriminatory voting change "whatever its actual effect may have been or may be"). A contrary rule, *i.e.*, requiring effect evidence in every case, would render the purpose prong of Section 5 meaningless. To the extent that some evidence of discriminatory effect is required to establish a constitutional violation, *Hunter v. Underwood, supra*, 471 U.S. at 232, there was strong evidence in this case of racial bloc voting, and the discriminatory effect of the majority vote requirement on the outcome of elections and in discouraging blacks from running for office.

A party opposing preclearance need not prove that a discriminatory purpose was the sole factor motivating the

decision of the legislature. As the Court explained in a related context in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-6 (1977), "racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." There is even greater reason for application of this rule in proceedings under Section 5, where the submitting jurisdiction has the burden of proof. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

This case is analogous to *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 649 F.Supp. 289 (M.D.Ala 1986), *affirmed in part, remanded in part*, 831 F.2d 246 (11th Cir. 1987), in which the court invalidated at-large elections in several Alabama counties under Section 2 because a pre-Voting Rights Act 1961 statewide numbered place law had been enacted with a discriminatory purpose and thus tainted the at-large systems wherever they existed in the state. The district court held that,

> regardless of the reasons for which the at-large systems were put into place in the various counties . . . the numbered place laws have inevitably tainted these systems wherever they exist in the state. In adopting the laws, the state reshaped at-large systems into more secure mechanisms for discrimination.

640 F.Supp. at 1357.

As with the designated post requirement in *Dillard*, the majority vote requirement in this case was enacted by the state in 1964 to reshape all elections, including those for superior court judges, into more secure mechanisms

for discrimination. Regardless of the reason new judges were subsequently added, their method of election is the product of intentional discrimination.

The fact that the discriminatory majority vote requirement was first enacted in 1964 does not shield its incorporation and use in new voting procedures from Section 5 review. It would be a perversion of *Beer v. United States, supra,* to hold that Section 5 prohibited review of an unconstitutional practice that was a critical feature of a voting change admittedly subject to pre-clearance merely because the unconstitutional practice was enacted prior to November 1, 1964. Nothing in the Court's Section 5 jurisprudence countenances such an anomalous result.

In *City of Lockhart v. United States,* 460 U.S. 125 (1983), the Court held that pre-Voting Rights Act practices which are continued by post-Act electoral changes are subject to Section 5 review where the new practices cannot be evaluated without considering them in light of the old. Thus, the continuation of two at-large seats and the use of numbered posts by the City of Lockhart were subject to Section 5 review in an action to preclear an increase in the size of the city's governing body and the introduction of staggered terms of office. According to the Court, "[t]he possible discriminatory purpose or effect of the new seats, admittedly subject to § 5, cannot be determined in isolation from the 'pre-existing' elements of the council."

460 U.S. at 131. For that reason, "the *entire system* introduced in the 1973 charter is subject to preclearance." *Id.* at 131-2 (emphasis added).[6]

Similarly, in *McCain v. Lybrand*, 465 U.S. 236, 255 n.27 (1984), the Court cited *Lockhart* with approval and indicated that post-Voting Rights Act changes cannot be evaluated "in an analytical vacuum," but "in the context of the entire electoral scheme." Of course, voting procedures in effect at the time of enactment of the Act which are unaffected by, and do not become an integral part of, new voting practices are not subject to review under Section 5. *Lockhart, supra*, 460 U.S. at 131 n.5, *citing and distinguishing Beer v. United States, supra*, 425 U.S. at 138-9.

The statutes creating new judgeships expressly included the circuitwide method of elections, with majority vote and numbered post requirements. The possible discriminatory purpose of the new seats cannot be determined in isolation from the pre-existing method of elections. The entire system of electing the added judges is subject to Section 5 review.[7] In light of *Lockhart* the district court should have considered the evidence of

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[6] The changes in *Lockhart* were precleared, but, insofar as Section 5 is concerned, had they been objected to the city would merely have kept its pre-existing procedures. United States v. Supervisors of Warren County, 429 U.S. 642, 647 (1977).

[7] The three judge court conceded this point by looking at the entire system of elections, including use of "[t]he majority vote requirement" and "the circuit-wide scope of the primaries," in determining that the addition of judges was not retrogressive. App. 12. There is no basis for applying a different analysis in determining the existence of racial purpose.

purposeful discrimination in the adoption of the majority vote requirement for the election of the added judges.

The district court erred in refusing to consider whether the method of electing judges – as opposed to merely the decision to add new judgeships – was infected with a discriminatory purpose. Preclearance should have been denied.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA,	)	
Plaintiff,	)	
	)	**Civil Action No.**
v.	)	**90-2065 SSH**
JANET RENO, *et al.*,	)	**(KLH, U.S.C.A.) (NHJ)**
Defendants.	)	

ORDER

(Filed Feb. 3, 1995)

Plaintiff State of Georgia brought this action seeking a declaratory judgment that 63 state statutes enacted after November 1, 1964, the effective date of the Voting Rights Act of 1965 (Act), creating or extending 62 new state superior court judgeships do not discriminate on the basis of race or color in violation of section 5 of the Act, 42 U.S.C. § 1973c. The case having been tried before the court, for the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED, that judgment be entered in the plaintiff's favor and it is further

DECLARED, that the 63 statutes at issue do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

IT IS SO ORDERED.

For the Three-Judge Court:*

/s/ Stanley S. Harris
STANLEY S. HARRIS
UNITED STATES DISTRICT JUDGE

Date: FEB. 3, 1995

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* Judge Johnson dissents and reserves the right to file a dissenting opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff,	)	
v.	)	Civil Action No. 90-2065 SSH (KLH, U.S.C.A.) (NHJ)
JANET RENO, *et al.*, Defendants.	)	

Before Henderson, Johnson* and Harris, JJ.

MEMORANDUM OPINION

(Filed Feb. 3, 1995)

The State of Georgia brought this declaratory judgment action under section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. § 1973c, seeking a declaration that the Georgia legislature's creation of 62 elective superior court judgeships after November 1, 1964 "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. A bench trial was held on October 11-14, 1994, with closing argument presented on November 17, 1994.[1] On the evidence presented, the court holds that the State of Georgia is entitled to the declaration it seeks. In

* Judge Johnson dissents and reserves the right to file a dissenting opinion.

[1] By stipulation of the parties, the direct evidence was presented in documentary form and the trial was conducted before a single judge of this three-judge court. *See* Order filed Aug. 26, 1994. Closing arguments were made before the entire three-judge court.

compliance with Rule 52 of the Federal Rules of Civil Procedure, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The State of Georgia is divided into 46 judicial circuits, each of which is allocated a specific number of superior court judges who serve four-year terms. See Plaintiff's Exhibit 88, Ga. Code Ann. § 15-6-2, Ga. Const. art. 6, § 7, ¶ 1.

2. Superior court judges are elected in non-partisan, designated-post primaries by circuit-wide majority vote followed by plurality vote general elections. *See* Ga. Code Ann. §§ 21-2-135, 21-2-284.1, 21-2-501.[2] The Georgia General Assembly established the designated-post and majority vote requirements in June 1964. *See* 1964 Ga. Laws No. 26 §§ 34-1002, 34-1514 (June 24, 1964) (now codified at Ga. Code Ann. § 21-2-501).[3] By a 1966 amendment to the Georgia constitution, general elections, which had previously been state-wide, were made circuit-wide to correspond to the primaries' scope. *See* 1966 Ga. Laws No. 47. This change was cleared by the United States Attorney

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[2] Under Georgia's election process, a candidate must garner a majority of votes cast in the circuit primary to make it to the general election. Ga. Code Ann. § 21-2-284.1. If no candidate wins a circuit-wide majority, a run-off primary is held between the two front runners. *Id.* The name of the primary winner is placed on the general election ballot along with a space for a write-in vote. *Id.* § 21-2-501.

[3] Before that time, a simple plurality was sufficient for election.

General in 1968. *See Brooks v. Georgia State Bd. of Elections*, 775 F.Supp. 1470, 1478 n.11 (S.D. Ga. 1989).

3. Despite Georgia's popular election system, a majority of superior court judges in office since 1968 – 153 of 233 – have initially come to their posts by gubernatorial appointment. Plaintiff's Exhibit 93 at 11. The Georgia Constitution provides that the governor fill any mid-term vacancy or new judicial position with his appointee who serves until the next scheduled election. Ga. Const. art. 6, § 7, ¶ 3. All Georgia governors in office since 1972 have appointed judges from a list provided by the Judicial Nominating Commission (Commission). The Commission, which consists of five gubernatorial appointees and five Georgia State Bar (Bar) ex officio members, has from the beginning followed substantially the same procedure: It (1) notifies bar members in a given jurisdiction of a court vacancy and the nomination deadline therefor, (2) accepts nominations for the vacancy from Bar members, (3) sends a letter to each nominee requesting that he complete an enclosed questionnaire and send it with other specific information to each Commission member by a set date, (4) investigates each candidate, discussing among themselves and with other Bar members each nominee's qualifications and obtaining information regarding any past disciplinary action, (5) meets to evaluate and compile, by secret ballot, a list of five nominees and (6) sends the Governor the list of nominees, along with the questionnaire each submitted and a report of the vote tally. A. Gus Cleveland, "The Judicial Nominating and Appointment Process in Georgia 1971-1990," 27 Ga. St. Bar J., Nov. 1990 at 54-59 (Exhibit A to Plaintiff's Direct Testimony of Cubbedge Snow, Jr.).

4. As of November 1, 1964, 61 superior court judgeships existed in the State of Georgia. *See* Plaintiff's Exhibit 1.

5. Since that time, 77 additional judgeships have been statutorily created, of which 62, including 14 that have never been filled,[4] have been denied clearance by the Attorney General. *See* Plaintiff's Exhibits 1, 3.

6. The 62 challenged judgeships were created by 62 separate acts during the period March 1967 to April 1992. *See* Plaintiff's Exhibits 21-77, 78-82.

7. In 1973 the Georgia General Assembly directed the Georgia Supreme Court to create the Judicial Council, *see* Ga. Code Ann. § 15-5-20, and itself established the Administrative Office of the Courts (AOC) to act as the Judicial Council's staff, Ga. Code Ann. § 15-5-22.

8. Since the creation of these two bodies, the AOC has conducted extensive studies upon which the Judicial Council has relied in making recommendations to the Georgia General Assembly regarding the creation of new judgeships. *See* Plaintiff's Direct Testimony of Robert L. Doss at 5; Plaintiff's Exhibits 4-20.

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[4] In a related challenge to Georgia's judicial selection process brought under section 2 of the Act, a three-judge court of the Southern District of Georgia enjoined the state from filling any vacant challenged posts but granted Georgia leave to retain judges in the already filled posts until March 1, 1995. *See Brooks v. Georgia State Bd. of Elections*, 790 F. Supp. 1156 (S.D. Ga. 1990); *Brooks v. Georgia State Bd. of Elections*, Civil Action No. CV288-146 (filed February 28, 1994).

9. Each superior court judgeship created since 1974 has been expressly recommended by the Judicial Council based on the AOC's detailed studies of population and caseload. *See* Plaintiff's Exhibits 4-20; *see also* Plaintiff's Direct Testimony of Robert L. Doss, Assistant Director of the AOC from 1973-1975 and Director of the AOC from 1975 to the present, at 4-11 (explaining that race had "play[ed] no part whatever" in the AOC or Judicial Council's deliberations regarding new judgeships).

10. The record contains no affirmative evidence that any of the pre-Judicial Council judgeships was created for a racially discriminatory purpose and offers substantial credible evidence that those judgeships were added solely to compensate for increased caseload.

Director Doss testified that during his early research for the AOC he "learned that at least during the decade ending in 1973 recommendations of the General Assembly for additional superior court judgeships or judicial circuits were governed mainly by population considerations as they related to judicial workload," that recommendations for additional judgeships were made "by individual judges, by attorneys, or by other interested persons" to their local state legislators who then introduced appropriate legislation, and that "there was a traditional 'rule of thumb' generally followed during this time period under which new judgeships were typically proposed on the basis of approximately 50,000 persons per judge in the affected judicial circuit." *Id.* at 3-4.

Former Georgia state representative Wayne Snow, Jr., who served on the House Judiciary Committee from 1963

through 1983, described the pre-Judicial Council judgeship creation process in some detail:

> Prior to the formation of the Judicial Council in 1973, legislators who sponsored bills to enact judgeships would appear before the Judiciary Committee. The committee required sponsors to be prepared to show and demonstrate a true need. At that time, we estimated that an additional judgeship would cost in excess of $100,000.00 of State funds annually and would balance the showing of need with the available funding. Legislators would present caseload information, population trends, and other evidence they had demonstrating need.
>
> * * *
>
> At no time did anyone on the Judiciary Committee or in the legislature express that race was a reason or a factor to create or not to create a new judgeship. In no instance where a judgeship was created while I was on the Judiciary Committee was race involved in the decision to enact a judgeship. The issue was always need.
>
> At no time during my service in the General Assembly did anyone ever suggest that Georgia's judicial election system was racially discriminatory. No one ever suggested that electing judges by a majority vote requirement or by circuit-wide vote was discriminatory. In fact, the method of election was controlled by other statutes which were not part of the legislation to create new judgeships.

Plaintiff's Direct Testimony of Wayne Snow, Jr. at 2-3, 4.

The Honorable Horace T. Ward, Senior District Judge of the United States District Court for the Northern District of Georgia, who served as a Georgia state senator from 1965 until 1974, testified:

> While I was in the State Senate, I served a number of years on the Judiciary Committee. While on the Judiciary Committee and in the Senate generally, statutes were proposed and acted upon that increased the number of superior court judges in various circuits in the state. My recollection of the information and materials presented in support of legislative action increasing superior court judges or creating new circuits related to caseload, increasing population, and the like. This was the basis upon which I voted for or against such legislation. At no time, to my knowledge, was any argument or any statement made by any senator or witness that there was a racial consideration in the decision to create new judgeships or judicial circuits. The method of electing these judgeships was not an issue when the Senate acted upon this legislation.

Plaintiff's Direct Testimony of the Honorable Horace T. Ward at 2.

11. Based on the evidence and the preceding findings of fact, it is clear to the court that the 62 judgeships added between 1968 and 1992 were created for the nondiscriminatory purpose of addressing increasing caseloads in specific circuits.

CONCLUSIONS OF LAW

1. Georgia is a "covered jurisdiction" under section 5 of the Act, 30 Fed. Reg. 9897 (1965); 28 C.F.R. § 51.4; *id.* pt. 51, app.; *Brooks v. Georgia State Bd. of Elections*, 997 F.2d 857, 859 (11th Cir. 1993),[5] and must therefore obtain clearance from this court or from the United States Attorney General before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c.

2. The creation of new superior court judgeships in Georgia has been held to be a "standard, practice, or procedure with respect to voting different from that in

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[5] A "covered jurisdiction" under section five is "a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of [title 42] based upon determinations made under the first sentence of section 1973b(b) of [title 42] are in effect." 42 U.S.C. § 1973c. The relevant prohibitions apply to any state or political subdivision "which (i) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (ii) the Plaintiff's Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* § 1973b(b). A "test or device" is defined as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.* § 1973b(c).

force or effect on November 1, 1964" subject to the clearance requirement because "it has a potential for discrimination." *Brooks v. Georgia State Bd. of Elections*, 775 F. Supp. 1470, 1477-80 (S.D. Ga. 1989) (citing *Dougherty County, Ga., Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978)), *aff'd mem.*, 498 U.S. 916 (1990).

3. "It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof." *Georgia v. United States*, 411 U.S. 526, 538 (1973) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966)).

4. Thus, it is incumbent upon Georgia to prove the absence of both discriminatory effect and discriminatory purpose in the creation of the superior court judgeships. *City of Pleasant Grove v. United States*, 429 U.S. 462, 469 (1987) (citing *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980)).

5. Georgia has established the absence of discriminatory effect. Section 5 prohibits only changes that produce a "retrogressive" discriminatory effect, that is, changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976); *see also Lockhart v. United States*, 460 U.S. 125, 133 (1983) ("Section 5 was intended to halt actual retrogression in minority voting strength. . . . "). Thus, a change that "d[oes] not increase the degree of discrimination against blacks . . . [is] entitled to § 5 preclearance." *Id.* at 134 (citing *Beer*). The defendants have conceded, as they must, that Georgia's creation of

the additional judgeships is not retrogressive. *See* Defendants' Proposed Conclusion of Law No. 13 ("The voting changes occasioned by the implementation of the 62 elected judgeships at issue here are not retrogressive with respect to minority voting strength, as that term has been construed by the Supreme Court in *Beer v. United States*, 425 U.S. 130, 141 (1975) [sic]."). In fact, they have never objected to the creation of new judgeships per se – only the way in which those judgeships are filled, namely through elections that are circuit-wide and require a majority of votes cast. Yet neither of those characteristics can be deemed retrogressive. The majority vote requirement, as noted above, was already in place on the Act's effective date, while the circuit-wide scope of the primaries, although adopted after that date, was cleared by the Attorney General.[6]

Nevertheless, the defendants argue that when Congress extended the Act in 1983, after both *Beer* and *Lockhart*, it expressed an intent to incorporate section 2 of the

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[6] The change to circuit-wide elections had, if anything, an ameliorative rather than dilutive effect on minority voting strength, replacing as it did the previous state-wide elections. The reduction in electorate size produced some circuits with a substantially higher percentage of black voters, thereby increasing the likelihood that black judges would be elected. *See Thornburg v. Gingles*, 478 U.S. 30, 55-56 (1986) (explaining that where voting is racially polarized, a high percentage of white voters may " 'minimize or cancel' black voters' ability to elect representatives of their choice.") (quoting S. Rep. No. 417, 97th Cong., 2nd Sess. 28 (1982); *cf. Beer*, 425 U.S. at 141 (concluding that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.").

Act into section 5 so that whenever a change violates section 2, clearance must be denied under section 5 regardless of retrogression.[7] No court has yet adopted the defendants' position and, given the scant support they have offered, we decline to do so.

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[7] Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. No showing of retrogression is required to establish a section 2 violation. *See generally Thornburg v. Gingles*, 478 U.S. 30, 42-47 (1986) (setting out requirements of section 2 vote dilution violation); *Holder v. Hall*, 114 S. Ct. 2581, 2587 (1994) ("Retrogression is not the inquiry in § 2 dilution cases.") (Kennedy, J., joined by Rehnquist, C.J.).

As Justice Kennedy recently explained, sections 2 and 5 of the Act "differ in structure, purpose, and application." *Holder v. Hall*, 114 S.Ct. 2581, 2587 (1994). One major difference is that section 5 on its face applies only to states that employed discriminatory voting schemes as of certain benchmark dates, thereby creating a voting strength "baseline" against which to measure the effect of proposed voting changes in covered jurisdictions. *See Holder*, 114 S.Ct. at 2587 (Kennedy, J., joined by Rehnquist, C.J.). As the *Beer* Court explained, in imposing and extending the admittedly extraordinary clearance requirement,[8] "Congress desired to prevent States from

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[8] The extraordinary nature of section 5 has long been recognized. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), Justice Black, dissenting in part, expressed his conviction that "§ 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government' " and that "the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces."). *Id.* at 359-60; *see also Georgia v. United States*, 411 U.S. 526, 545 (Powell, J., dissenting) ("It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review."); *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 141 (1978) ("[Section 5's] so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable.") (Stevens, J. joined by Burger, C.J., and Rehnquist, J., dissenting) (footnote omitted; ellipsis in opinion).

'undo[ing] or defeat[ing] the rights recently won' by Negroes," *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969)) (alteration in opinion), and "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new (discriminatory) procedures and techniques," *id.* at 140-41 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975)) (alteration in opinion). Further, "Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting. . . . ' " *Id.* at 141 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)) (alteration and emphasis in opinion). Thus, the *Beer* court reasoned, "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

There is little reason to believe Congress has changed its mind since *Beer* and *Lockhart*. The defendants' sole authority for their novel argument consists of a single sentence in a Senate Judiciary Committee report footnote and their own regulation. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) ("In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.") (Report); 28 C.F.R. § 51.55(b)(2) ("In those instances in which the Attorney General concludes

that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance."). In our opinion, neither shows a change in Congressional intent.

The sentence cited from the Report must be considered in context. When it extended the Act in 1982, Congress amended section 2 in reaction to and repudiation of the Supreme Court's plurality position in *Mobile v. Bolden*, 446 U.S. 55 (1980), and its progeny, to make clear that "proof of discriminatory intent is not required to establish a violation of Section 2," Report at 2, any more than it is to prevent section 5 clearance. The sentence cited by the defendants was intended merely to emphasize that proof of the requisite unlawful effect is in itself sufficient under either section, regardless of motive. We do not read the lone remark to change the nature of the effect necessary to deny section 5 clearance. That the Committee was aware of *Beer* and its retrogression holding is clear from the immediately preceding sentence. Report at 12 n.31 ("Under the rule in *Beer v. United States*, 425 U.S. 130, a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141; *see also* 142 n. 14 (citing to the dilution cases from *Fortson v. Dorsey*[, 379 U.S. 433 (1965)] through *White v. Regester*[, 412 U.S. 755 (1973)])."). Had Congress intended to overturn that holding it could have amended section 5 as it did section 2, with an explanation similar to the lengthy one on the section 2 amendment. *See* Report at

15-43. It did not. Given the Congressional inaction, the earlier legislative history supporting the retrogression requirement, set out in *Beer*, 425 U.S. at 140-41,[9] and the extensive case law applying the requirement, both before and after the 1982 amendments,[10] we decline to adopt the defendants' position based on the snippet of legislative history they have offered.

As for the DOJ regulation, it is entitled to no deference from this court where, as here, Congress has made clear its contrary intent. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

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[9] *See supra* Conclusion of Law 5 ¶ 3.

[10] The Supreme Court continues to construe section 5 to require retrogression, *see Shaw v. Reno*, 113 S. Ct. 2816, 2830-31 (1993) ("Under [the 'nonretrogression'] principle, a proposed voting change cannot be precleared if it will lead to 'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise' " (*quoting Beer*, 425 U.S. at 141) (dictum), and this district has continued to impose the requirement, *see State of New York v. United States*, Civil Action No. 94-2219, slip op. at 6-8 (Dec. 22, 1994) (expressly rejecting the defendants' theory); *Texas v. United States*, 802 F. Supp. 481, 485-86 (D.D.C. 1992) ("In order to grant preclearance to a reapportionment plan a court must make two findings. First, the plan may not be retrogressive in terms of minority voting rights when compared to the plan that would be in effect were the plan in question not approved.") (citing *Beer*); *County Council of Sumter County, S.C. v. United States*, 596 F. Supp. 35, 39 (D.D.C. 1984) ("In order to rebut the inference of discriminatory effect, plaintiffs here were required to prove that the at-large election system in Summer County will not 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' ") (quoting *Beer*, 425 U.S. at 140).

For the foregoing reasons, we conclude that the creation of the additional superior court judgeships has no discriminatory effect under section 5 because it is not retrogressive.

6. The additional judgeships were not established for a discriminatory purpose. This conclusion flows ineluctably from our factual findings above regarding the State of Georgia's purpose in creating new superior court judgeships and the methods employed to do so. *See supra* Findings of Fact 7-11. The defendants assert discriminatory intent can be inferred from the various statutes' reference to the existing electoral process. *See, e.g.*, Plaintiff's Exhibit 21 § 2 (election for new judgeship "shall be held and conducted in the manner hereafter provided by law for the election of judges of superior courts of this State."). We view this argument, however, simply as an attempt to circumvent the section 5 retrogression rule and thus to challenge the majority vote requirement, which was in force on November 1, 1964, the Act's effective date. Further, the evidence affirmatively shows that the majority vote requirement was not even discussed when the new judgeships were subsequently created. *See supra* Finding of Fact 10. Thus, we do not see how the statutory recitation of the cited boilerplate language, which does not even describe the specific electoral method to be used, can be construed as evidence of discriminatory intent in creating the new judgeships.

7. Plaintiff State of Georgia is entitled under section 5 of the Act to a declaration, as set out in the accompanying order, that the creation of the 62 additional judgeships since the Act's effective date "does not have the purpose and will not have the effect of denying or

abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff, v. JANET RENO, Attorney General of the United States, *et al.*, Defendants.	)	Civil Action No. 90-2065 (SSH) (KLH, U.S.C.A.) (NHJ)

ORDER

(Filed Apr. 4, 1995)

Before the Court is a "Motion to Intervene as Parties Defendant for Purposes of Appeal," filed by petitioners Tyrone Brooks and twenty-one others, all currently amicus curiae in this action. Also before the Court is the opposition of plaintiff State of Georgia to petitioners' motion.

This Court lacks jurisdiction over petitioners' motion. Petitioners filed the instant motion to intervene on March 6, 1995, noting that the Department of Justice had yet to file a notice of appeal in this action. The Department of Justice filed a notice of appeal that same day, twenty-four minutes after petitioners filed their motion to intervene. "[T]he filing of a valid notice of appeal from a final order of the district court divests that court of jurisdiction to act on the matters involved in the appeal, except to aid the appeal, correct clerical errors, or enforce its judgment so long as the judgment has not been stayed or superseded." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897,

928 (5th Cir. 1983); *see also Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1979); *Hobson v. Hansen*, 44 F.R.D. 18, 19 (D.D.C. 1968), *aff'd in part, rev'd in part sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1979) (district court had jurisdiction over proposed intervenors' motions only because court of appeals had remanded case to district court to hear motions).

Accordingly, since this Court lacks jurisdiction over petitioners' motion, the motion is dismissed.

SO ORDERED.

For the Three-Judge Court:

/s/ Stanley S. Harris
Stanley S. Harris
United States
District Judge

Date: APR 4 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff,	)	
v.	)	Civil Action
JANET RENO, et al., Defendants,	)	No. 90-2065 (KLH, U.S.C.A.) (SSH) (NHJ)
TYRONE BROOKS, et al., Defendant-Intervenors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed Jun. 1, 1995)

Notice is hereby given that Tyrone Brooks, Lanett Stanley, Billy McKinney, Joe Beasley, Venus E. Holmes, Michael Robinson, Edward Brown, Rev. Dr. William Howell, John White, Mary Young-Cummings, Mary Black, Willie Mays, William Young, Deanie Frazier, Diane Harvey Johnson, Rev. G. L. Avery, Juanita T. Williams, Patricia C. Jones, Edith Engram Grant, Henry Cook, Annie Smith, and Ercel Baldwin, hereby appeal to the Supreme Court of the United States Court pursuant to 28 U.S.C. §§ 1253 and 2101(b), and 42 U.S.C. § 1973c, from the order and judgment of the three judge court entered on April 4, 1995 denying their motion to intervene as parties defendant for purposes of appeal.

Dated: June 1, 1995.

Respectfully submitted,

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§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact to seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(2)

Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

No. 95-177

In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, *et al.*,

Appellants,

versus

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the District Court correctly rejected the contention of *amici* that Section 5 of the Voting Rights Act could be construed in a wholly new way that would force the State of Georgia to repeal laws that have been in effect since before Section 5 was adopted?

II. Whether the District Court acted within its discretion in denying Appellants, who were serving merely as *amici curiae*, to intervene for the purpose of pursuing an appeal where the United States itself was a party defendant and could have pursued any appeal that might have been meritorious?

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No. 95-177

In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, *et al.*,

Appellants,

versus

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

MOTION TO AFFIRM

The State of Georgia hereby moves this Court to affirm the order and judgment of the three-judge District Court in this case. Appellee respectfully submits that this case is an appropriate one for summary affirmance because the Appellants are attempting to advance theories of the Voting Rights Act that are contrary to the purpose of the Act and which can fairly be described as frivolous. Moreover, Appellants in this Court were not even parties below. They complain, as a threshold to raising the merits issues, that the District Court erred in refusing to allow them to intervene to pursue the instant appeal. Because the District Court was well within its authority in denying intervention, a summary affirmance is especially appropriate here. If probable jurisdiction

were noted in this case, Appellants would be unable at the time of plenary consideration to show that they even had a right to be in this Court.

STATEMENT OF THE CASE

This is an appeal from a declaratory judgment entered under Section 5 of the Voting Rights Act concerning sixty-two Superior Court seats enacted by the Georgia General Assembly since November 1, 1964. *See* 42 U.S.C. § 1973c. Section 5 stipulates that "voting changes" must receive a favorable declaratory judgment if they do not have the "purpose" or "effect" of discriminating. 42 U.S.C. § 1973c. In this regard, the term "effect" has a very special and narrow meaning. Specifically, it refers only to whether a voting change is "retrogressive"; that is, whether the new practice disadvantages minority voters *in comparison to* their position on November 1, 1964. *Beer v. United States,* 425 U.S. 130, 140-41 (1976); *City of Lockhart v. United States,* 460 U.S. 125, 134 (1983); *Holder v. Hall,* 129 L.Ed.2d 687 (1994); *Shaw v. Reno,* 125 L.Ed.2d 511 (1993). In this case, one could not reasonably contend that there has been "retrogression" when new Superior Court judgeships have been added. Each new judgeship was elected just like the pre-existing ones.

Nevertheless, for the first four years of the pendency of this case, the Department of Justice (DOJ) opposed Section 5 preclearance by maintaining that merely adding new judgeships was "retrogressive." On the eve of trial, the government acknowledged that its "retrogression" defense had no merit. Because the "effect" part of Section

5 was removed with the elimination of the retrogression issue, the only remaining element of Section 5 was the "purpose" requirement. In that regard, it was undisputed that each of the judgeships at issue was enacted for only one purpose: to add additional judges in order to meet increasing caseloads.

The DOJ's Administrative Rulings. Before this action was brought by Georgia, preclearance was sought under Section 5 administratively. The DOJ objected to all Superior Court judgeships in those portions of the State where there was a significant black population. In explaining its objection, the DOJ did not suggest that black candidates had been discriminated against in judicial elections, nor did the DOJ suggest that there was any "under-representation" of blacks on the bench *vis-a-vis* the number of eligible lawyers. Rather, the DOJ's objection rested on its displeasure with Georgia's majority vote law. For example, the DOJ's ruling questioned whether the majority vote law was enacted *in 1964* for some racially discriminatory purpose. The government ignored the fact that this law was part of the State's mandatory, state-wide election system *prior to the effective date of Section 5.* The entry of this objection necessitated the filing and trial of this action.

Georgia's Superior Court Judgeships. The Superior Courts of the State of Georgia have been Georgia's trial courts of general jurisdiction since the State was founded over two centuries ago. Superior Courts have plenary civil jurisdiction, and they have sole jurisdiction over equity cases, felony cases, domestic and custody cases, and several other classes of civil cases. They also exercise a wide variety of appellate and certiorari jurisdiction

over inferior tribunals, administrative bodies, and local government bodies. *See* O.C.G.A. § 15-6-8.

As of November 1, 1964, the General Assembly had authorized sixty-one Superior Court judgeships throughout the State. From 1965 through trial, an additional eighty-eight Superior Court judgeships were authorized by the General Assembly.

As of trial, Georgia thus had one hundred fifty-nine Superior Court judgeships authorized by the individual acts of the General Assembly that created those judgeships. Each and every one of the Superior Court seats added since November 1, 1964 was added to a specific Superior Court judicial circuit. There are presently forty-six separate and distinct Superior Court circuits in the State of Georgia. Some circuits in urban areas consist of only one county, while other circuits comprise several counties. Never in the history of the State has any county been split into two or more circuits.

Judicial elections in the State of Georgia have a long tradition. The very first election of judges in the United States took place in this State nearly two centuries ago under the 1812 Georgia Constitution. Ga. Const., Art. III, Sec. IV (1812). *See generally,* Winters, *Selection of Judges – An Historical Introduction,* 44 Tex. L. Rev. 1081, 1082 (1966). While several methods of selecting judges prevailed during the 19th century, Georgia's Superior Court judges have now been elected continuously by the voters for nearly a century.

Candidates for Superior Court judgeships are nominated at primary elections by the voters in each of the respective circuits, just as they have been for the past century. Candidates so nominated are then elected at the November general election. Since the adoption of Georgia's 1983 Constitution, judicial elections have been nonpartisan. *See* Ga. Const., Art. VI, Sec. VII, Par. I.

Superior Court candidates must obtain a majority of the votes in order to win nomination or election. This requirement applies equally to all state and county offices in Georgia. The majority vote requirement represents no change in the State's law since November 1, 1964. The exact same provision was in effect on that date. As such, this practice is not reached by Section 5. *See* 42 U.S.C. § 1973c.

Partly as an adjunct to majority voting, all Superior Court judges – and all other state and county officials throughout Georgia – must be elected pursuant to separate designated places (sometimes called "posts") on the ballot. This practice was codified in the 1964 Election Code and it, too, was effective prior to the November 1, 1964 date with regard to all Superior Court judgeships, as well as other offices. *See* O.C.G.A. § 21-2-135. As a practical matter, of course, this "seat identification requirement" is necessary to effectuate the majority vote requirement. It is mechanically impossible to have a majority vote requirement without also requiring separate and distinct positions.

The Selection of Superior Court Judges in Georgia. To fully appreciate how Georgia's Superior Court and other

high-level judicial officers are selected, one has to consider not only the election procedures but the appointment process as well. When Superior Court judgeships become vacant and when new judgeships are created, those vacancies are filled by gubernatorial appointment. Beginning when Jimmy Carter was elected Governor, a Judicial Nominating Commission (JNC) has screened applicants and made recommendations to the Governor. Since the creation of the JNC, the Governor's appointments have come exclusively from the names recommended by the Commission.

As a practical matter, the great majority of judges have come to the bench by appointment. From 1968 to mid-1994, one hundred fifty-three of the two hundred thirty-three Superior Court judges came to their office by appointment. Of the one hundred forty-five Superior Court judges serving in mid-1994, one hundred came to their office by appointment, or sixty-nine percent.

The Racial Make-Up of Georgia's Bench. An indication of whether there is racial discrimination in the selection and retention of Georgia judges comes from the evidence regarding the appointment and election experience of African-American lawyers as judges. First, however, one must look at the racial composition of the Bar itself, for therein lies the crux of this case. It is at this threshold point that the DOJ's and Appellants' charges of discrimination foundered. The reason why Georgia has fewer black Superior Court judges, percentage-wise, than there are blacks in the general population is simple. It is because the percentage of blacks in the Bar who are eligible to serve as Superior Court judges is much lower than the African-American percentage of the population

at large. The percentage of blacks in the Bar has ranged from one percent in the early 1970's up to the present 4.1 percent for lawyers with the legal minimum of seven years of experience. (Pl. Ex. 93, p. 7 & Tab 2.)

In most of the Superior Court circuits in which judgeships were at issue in this case, the number of African-American attorneys is negligible. Of the thirty judicial circuits in which the DOJ challenged a new judgeship, there are eight that did not have a single eligible black attorney. Of the remaining circuits, there are six which had only a single black attorney. Six others had only two black attorneys. It is these facts that Appellants ignore.

Not only is the racial makeup of the bench in Georgia inconsistent with the contention that there is racial discrimination in the process of selecting and electing judges, the evidence shows that the State has pursued affirmative efforts to bring African-Americans to the bench wherever possible. In those Superior Court circuits where there are just five or more African-American attorneys who satisfy the minimum eligibility requirements, ten of the fifty-seven Superior Court judges were black as of May 15, 1994. That is eighteen percent. (Pl. Ex. 93, p. 9) By comparison, only five percent of the Bar in those eleven circuits is black. (*Id.* at Tab 4) Wherever there has been a realistic opportunity to bring African-Americans to the Superior Court bench in Georgia, it has been done.

Georgia's Experience with the Appointment of African Americans to the Bench. Throughout the history of the JNC, African-American applicants seeking judgeships have fared well. The rate of appointment of African-Americans

has exceeded that of white applicants. Since the first Superior Court appointment through the JNC process in 1972, there have been a total of eight hundred seventy-five lawyers (or judges of other courts) who have sought Superior Court judgeships. Of these eight hundred seventy-five persons, one hundred six have been black. That is twelve percent, which exceeds the percentage of African-American lawyers who have been in the Bar over this time. (Pl. Ex. 93, Tab 2 & 3)

If African-American lawyers were appointed to the one hundred twenty-six Superior Court openings filled by appointment from 1972 to May 15, 1994 in proportion to their *current* numbers in the Bar statewide, there would have been five appointments.[1] If minority lawyers had been appointed in proportion to their rate of application to the JNC, then there would have been eight black appointments. (Pl. Ex. 94, Tab 2) But in fact, since the JNC process has been in effect and up to the time of trial, twelve African-American lawyers were appointed to Superior Court judgeships by the four different governors who served during the time, which amounts to ten percent of all such judgeships appointed. These facts demonstrate that the primary route to the Superior Court bench in Georgia, gubernatorial appointment, is free of discrimination.

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[1] The expected number of black appointments based on the actual numbers of African-American lawyers in each circuit at the time each appointment was made is significantly lower. (Pl. Ex. 94, Tab 2)

Georgia's Judicial Election History and the Experience of African-American Candidates. The importance of appointment as a route to the judiciary in Georgia is underscored by the history of judicial elections in this State. Simply put, incumbent judges are rarely beaten. The election data in this case, which ran from 1968 through May 15, 1994, reflects six hundred twenty-one instances where an incumbent Superior Court judge stood for election. In five hundred thirty of those elections, the incumbent was unopposed. In only ninety instances did they draw opposition, and in only twenty-six, which is four percent of all the elections, were those incumbents defeated. (Pl. Exs. 1 & 93, p. 15)

Black candidates have fared extremely well and comparable to whites in running for election to hold their judicial offices as incumbents. The most dramatic proof of that is in the state-wide races that have been held. There have been four instances where African-American judges have run state-wide for reelection and been opposed by white challengers. In each of these instances, the black incumbent won election state-wide.

This experience with the state-wide races is confirmed by the experience of African-American trial court judges. There have been twenty-eight instances where African-American judges stood for reelection as Superior Court or State Court incumbents. (Pl. Ex. 93, pp. 16-18) In only one instance in the history of the State of Georgia has a black incumbent ever been defeated by a white challenger. That single instance occurred thirteen years ago when a white female judge of the Muscogee County State Court ran against a recently appointed black male Superior Court judge in 1982. In every other instance

where African-American trial court judges have stood for reelection as incumbents, they have prevailed. That is a success rate of 27 out of 28. (Pl. Ex. 93, p. 13)

Open seat elections, where no incumbent is running, comprise a small portion of all of the judicial elections in Georgia. In this category of elections, African-American candidates have again fared well. Of nine instances where black and white judicial candidates opposed one another for an open seat on either the Superior Court or the State Court, a black candidate was successful five times, or fifty-five percent. Moreover, in one of those races, the white candidate received a majority of the votes cast by African-Americans. Hence, one might more accurately describe this pool of events as showing that black candidates won five out of eight of the black-white races – which would discount this one race – or that black candidates and black voters were successful in six out of nine of these elections. (Pl. Ex. 93, Tab 10)

ARGUMENT

I. THE ADDITION OF SUPERIOR COURT JUDGESHIPS IN GEORGIA DOES NOT VIOLATE SECTION 5.

A. Appellants' Effort to Force the Repeal of Laws in Effect Prior to the Passage of Section 5 is Unauthorized.

The Appellants' Section 5 theory is foreign to the law. As a *quid pro quo* for obtaining a new judgeship, Appellants would attach a price, that price being the repeal of

statutes that are beyond the scope of Section 5 because they were in effect prior to November 1, 1964.

Section 5 was not designed to permit review of electoral practices of a State that were in effect prior to the Act's adoption. Section 5 was enacted primarily as a complement to the 1965 Voting Rights Act suspension of literacy tests. Because Congress believed that the elimination of these tests would lead to registration of new minority voters, Section 5 was included to ensure that no changes in the laws of covered jurisdictions would be implemented that would undercut the voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). This underlying purpose of Section 5 was discussed long ago in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undo[ing] or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

Because of the narrow mission of Section 5, this Court has rejected the idea that it provides *carte blanche* authority, for either the DOJ or a preclearance court, to determine whether any electoral practice of a covered jurisdiction is free from possible discrimination. *City of*

Lockhart v. United States, 460 U.S. 125 (1983). Claims of that sort must be brought, where warranted, by the traditional route of a civil action filed in the jurisdiction of the defendant, and with the challenging party – be that the United States or a private person – bearing the normal burden of proving illegal discrimination.

The *Beer v. United States* rule was followed in *City of Lockhart v. United States*, 460 U.S. 125 (1983), which involved a change by Lockhart, Texas from a "general law" city government to a home-rule city council and mayor. Under the new home-rule system, the mayor and two councilpersons were elected in even numbered years using separate numbered posts. This Court accepted the contention that eliminating numbered-post elections might benefit minority voters, but even if true, that was irrelevant since numbered posts had been used under the prior method of electing the city government, and they were in use on the effective date of the Voting Rights Act. 460 U.S. at 135. The limited reach of Section 5 is succinctly stated in the following quotations from *Lockhart*:

> Although there may have been no improvement in [minority] voting strength, there has been no retrogression either. 460 U.S. at 135.
>
> Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance. 460 U.S. at 134.

There is also this Court's decision in *Holder v. Hall*, 129 L.Ed.2d 687 (1994), where Justice Kennedy discussed the respective roles of Sections 2 and 5 of the Voting Rights Act in his opinion.

To be sure, if the structure and purpose of § 2 mirrored that of § 5, then the case for interpreting §§ 2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application. Section 5 applies only in certain jurisdictions specified by Congress and "only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138 (1976); *see* 42 U.S.C. § 1973b(b) (specifying jurisdictions where § 5 applies). In those covered jurisdictions, a proposed change in a voting practice must be approved in advance by the Attorney General or the federal courts. § 1973c. *The purpose of this requirement "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."* 425 U.S. at 141. *Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change. See id.*, at 141. The baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur. *See* 28 C.F.R. § 51.54(b) (1993) (emphasis added; footnote omitted).

B. Appellants' Attempt To Circumvent Section 5's Nonretrogression Rule Would Re-Write That Law.

The District Court correctly applied the *Beer-Lockhart-Holder* interpretation of Section 5. Because the method of

electing Georgia's new judges is precisely the same as it was for pre-existing judgeships, the Section 5 "benchmark" for the election of Superior Court seats is election by all the voters in the circuit and by majority vote. This is the uniform law of the State consistent with statutes of state-wide application that were in effect on November 1, 1964. The only change at issue here, the addition of additional seats, caused no change whatsoever from the benchmark election practices. This case falls squarely within the *Lockhart* decision.

While the Appellants here selectively criticize the State's practices relating to majority voting and circuit-wide elections, they would be equally empowered, under their theory, to insist that Georgia change any other practice that is used in the election of new judgeships, even though that practice was a part of the State's mandatory, state-wide laws on November 1, 1964. Under their theory, for example, the DOJ could force the State of Georgia – as a condition to increasing its judiciary – to strike from its Constitution the requirement that Superior Court judges be members of the Bar for seven years as a "candidate qualification" that has a discriminatory impact. The State could be equally forced, as a prerequisite to adding a new Superior Court judgeship, to expand its voter registration procedures, or even to require postcard registration; to extend the hours of election when its polling places are open, or even to shorten them if the Attorney General believed that that was advantageous to black voters; to expand the number of polling places, to reduce them, or simply to move them around to other locations if the Attorney General concluded that that might advance the interest of black voters; or to modify any of the other

hundreds of practices that are prescribed by the State's election laws, *see* O.C.G.A. Title 21. These are "voting practices" that are just as much a part of judicial elections as are those practices that Appellants and the DOJ arbitrarily chose to attack.

No one could rationally argue that Congress contemplated that either the Attorney General or a Section 5 district court have such extraordinary powers, but that is exactly what the Appellants claim.

C. Georgia's New Judgeships Are Not Objectionable Because Of Some Claimed "Purpose To Discriminate."

Since there has been no retrogression in this case, that should be the end of the inquiry under the *Beer-Lockhart-Holder* rulings. If some kind of a purpose inquiry were also appropriate in this case, however, it would be completely different than what the Appellants suggest. Appellants contend that the statutes here can be vetoed as purposefully discriminatory because the State discriminated when: (1) the General Assembly enacted allegedly discriminatory laws before November 1, 1964; (2) the General Assembly failed to repeal those laws later; or (3) the General Assembly failed to enact other laws that would have changed the way in which Superior Court judges are elected in Georgia. These theories of "purposeful discrimination" bear no relationship to this Court's past rulings.

A statute is not "purposefully discriminatory" unless the underlying, motivating purpose behind the specific law was a discriminatory one. *Hunter v. Underwood*, 471

U.S. 222 (1985); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Jefferson v. Hackney*, 406 U.S. 535 (1972). It is not enough, for example, that a statute's discriminatory consequences may have been foreseen at the time of enactment. Discriminatory purpose occurs only if a statute was enacted *because of* discriminatory motive, and only if the statute would not have been enacted *but for* that motive. *Personnel Administrator of Massachusetts v. Feeney, supra*, at 279. Even where discrimination was a motive, *illegal* discrimination does not arise if the State would have adopted the statute regardless of the tainted motive. *See generally Mount Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Hunter v. Underwood*, 471 U.S. 222 (1985).

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case the State legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse affects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney, supra*, at 279.

D. None Of The Enactments At Issue In This Case Were Motivated In The Slightest Part By Racial Discrimination.

Appellants avoid the real purpose behind these enactments because race had nothing whatsoever to do with them. All of these statutes did one thing, and one thing only – they added seats to the various Superior

Court circuits. None of the statutes affected the method of electing those seats once created, and race played no role whatsoever in adopting these statutes. This was the undisputed testimony of present and past federal judges, state judges, state legislators, and personnel from the Administrative Office of the Courts, all of whom were personally involved in one way or another in the evaluation, recommendation, and enactment of these laws over the past 30 years. The sole purpose was to add judges to meet the courts' increasing caseloads.

E. The Convoluted Arguments Of The Appellants Are Illustrated By Their Attempt To Make Georgia's 1964 Majority Vote Law A Central Theme Of Their Case.

The actual evidence concerning the purpose behind the adoption of Georgia's 1964 majority vote law is radically different than what Appellants present in their Jurisdictional Statement. How Georgia's present majority vote law came to be enacted was described in detail by the persons who were most active in its adoption. These witnesses included former Governor Carl Sanders, former Speaker of the House and later Georgia Supreme Court Justice George T. Smith, former Senator and Administration Floor Leader Milton Carlton, and Melba Williams, a past Democratic National Committeeperson and an active member of Governor Sanders' Election Law Study Committee. In brief, the law was one small provision in a massive new Election Code, the first comprehensive Election Code Georgia had ever had. Prior to then, the State's laws were confusing, to the extent there was law at all. Before the 1964 Code, the political parties had

nearly complete control over all aspects of the primary elections, including the actual dates of the elections, when there would be qualifying, qualifying fees, whether a majority vote would be required to win, etc. Some counties used majority vote rules and others allowed their nominees to be elected by a plurality vote. That practice might change from election to election based on the whims – and self interest – of the local political executive committee members. Wholly independent of any question of race, the authority of the local committees was abused to the detriment of the public and the voters.

It is in this context that the majority vote law that Appellants complain about was adopted. The General Assembly had to make a choice, since it was certain that there was going to be one uniform rule, and that choice was whether to have plurality voting everywhere or to have majority voting everywhere. Given the experience with plurality voting manipulation by the courthouse crowds in many of the rural counties, and given that majority vote requirements had worked fine where they were used, the choice was simple. The State rejected plurality voting, and it could not reasonably have done otherwise given Georgia's experience with both voting systems, plurality and majority.

As a matter of fact, Appellants' contentions regarding majority voting are misplaced. As a matter of law, those contentions have nothing to do with the Section 5 issues in this case.

II. INTERVENTION WAS PROPERLY DENIED IN THIS CASE.

A. Appellants Are Unable To Point To A Single Fact Or Issue That Was Not Adequately Addressed By The United States.

In exercising its discretion in passing on an application for intervention, a crucial question is whether the interests of the movants are adequately protected by parties to the case. In their 1990 and 1991 motions to intervene, Appellants suggested that the United States might not adequately represent their interests. Now, after years of litigation and a full trial, Appellants still can point to no remotely meritorious legal or factual issue that the United States left untouched. To the contrary, if any criticism were to be levied at the United States for its defense of Georgia's claims, one could suggest that the government raised far too many legal and factual contentions, some of which were plainly beyond what could be characterized as reasonable positions.

B. The Statutory Claims Involved In This Case Are Uniquely Inappropriate For Private Intervention.

Equally important in determining whether intervention may or may not be appropriate in a given case is the nature of the claims that are before the court. That factor weighs heavily against intervention here.

This case arises solely under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. That statute, by its express terms, makes the issues before the District Court

the exclusive concern of the State of Georgia and the United States. Section 5 represents the most significant intrusion into the sovereignty of state government that has occurred this century. It divests southern states (and portions of some other states) of the right to regulate their own election affairs without the prior approval of either the DOJ or the District of Columbia District Court. Whether such approval should be forthcoming or not is a matter over which private parties have no statutory role whatsoever.

This Court has made it clear that the unique nature of Section 5 proceedings makes them especially ill-suited for participation by private parties. In *Morris v. Gresette*, 432 U.S. 491 (1977), the Court held that the Attorney General's failure to interpose a timely objection under Section 5 was absolutely immune from subsequent review in an action brought by private parties. The Court based its conclusion on a variety of considerations, which included the extraordinarily harsh nature of Section 5; the importance of allowing covered jurisdictions expeditious treatment of their claims; the fact that no party's right to challenge electoral practices is precluded by Section 5 preclearance; and the fact that the Attorney General has a unique power under Section 5. 432 U.S. at 501-07.

While *Morris v. Gresette* involved a different issue than the present case, Georgia believes that the reasoning behind the *Morris* decision is very instructive. Indeed, the Appellants' position is fundamentally at odds with this Court's reasoning in *Morris*. They contend that they might be better able to protect the interests of black voters than the United States Department of Justice, notwithstanding the fact that the DOJ has a congressional

mandate to do just that. Appellants' assertions are belied by the extensive record in this case.

Moreover, since the Attorney General has the absolute authority to preclear any electoral change, Appellants' suggestion that they should be allowed to take a position different than the government's is especially inappropriate in a Section 5 case. This is particularly true where the intervenors seek to assert a right of appeal that has been abandoned by the United States.

When the United States decides not to appeal an adverse Section 5 judgment, or to abandon such an appeal, that is tantamount to allowing Section 5 preclearance. *Since the DOJ has plenary power to grant Section 5 approval of any election change, to allow intervention for the purpose of pursuing appeals contrary to the decision of the DOJ would effect a wholesale rewriting of Section 5.* Intervention for that purpose would transfer the Section 5 approval power from the Attorney General to private parties, contrary to the express terms of the statute. *See* 42 U.S.C. § 1973c.

C. All Claims The Appellants Might Have Are Preserved Without An Appeal In This Case.

While private parties have no role in the Section 5 approval and decision-making process, they do have a right to bring an action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Under Section 2, they may challenge any of the statutes at issue in this case if they still contend that they are racially discriminatory in their purpose or result. The right to bring such an action

remains unimpaired by the decision of the District Court. Section 5 is explicit in that regard. It states:

> Neither an affirmative indication by the Attorney General that no objection would be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. § 1973c.

Thus, movants were not prejudiced in any way when intervention was denied.

D. The Motion To Intervene Was Untimely And Was Properly Denied For That Reason.

Thirty days elapsed from the District Court's entry of final judgment until the motion to intervene was filed. The motion was filed on the very last day in which a notice of appeal might be filed. The purported notice of appeal attached to the motion to intervene was ineffective since at the time it was filed movants were not parties with any right to appeal. They were simply *amici* who, as such, had no standing to appeal. *United States v. Oregon*, 913 F.2d 576, 589-90 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *Moten v. Bricklayers Int. Union*, 543 F.2d 224, 227 (D.C. Cir. 1976). Appellants' attempt to appeal the District Court's judgment was untimely.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the judgment of the District Court be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

No. 95-177

In the Supreme Court of the United States

OCTOBER TERM, 1995

TYRONE BROOKS, ET AL., APPELLANTS

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO VACATE AND DISMISS

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QUESTIONS PRESENTED

Minority voters sought to intervene in this case for purposes of appealing the district court's merits judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The United States' notice of appeal was pending at the time the district court considered the intervention motion. The appeal in this case presents the following two questions:

1. Whether the district court correctly dismissed the intervention motion for lack of jurisdiction.

2. Whether appellants, who are not parties in this action, may currently appeal the three-judge court's merits judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-177

TYRONE BROOKS, ET AL., APPELLANTS

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO VACATE AND DISMISS

Pursuant to 28 U.S.C. 2106 and Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court denying intervention for lack of jurisdiction be vacated, that the case be remanded for consideration of the intervention motion, and that the appeal be otherwise dismissed.

OPINIONS BELOW

The opinion of the three-judge district court granting a declaratory judgment for the State of Georgia (J.S. App. 3-19) is reported at 881 F. Supp. 7. The district court's order denying appellants' motion to intervene (J.S. App. 20-21) is unreported.

JURISDICTION

The judgment of the three-judge district court granting a declaratory judgment was entered on February 3, 1995. On March 6, 1995, appellants filed a motion to intervene as defendants, together with a notice of appeal. See J.S. 4. The judgment of the district court dismissing appellants' motion to intervene was entered on April 4, 1995. Appellants' notice of appeal (J.S. App. 22-23) was filed on June 1, 1995, and the appeal was docketed on July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b),[1] and 42 U.S.C. 1973c.

STATEMENT

The State of Georgia is a jurisdiction covered under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b. Under Section 5 of the Act, 42 U.S.C. 1973c, a covered jurisdiction may not implement a change in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,"[2] unless (1) it has obtained a declaratory judgment from the United States District Court for the

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[1] Although former Rule 18.1 of the Rules of this Court (1994) on its face restricted the time in which to file an appeal to 30 days, 28 U.S.C. 2101(b) authorizes the filing of an appeal within 60 days of final judgment. "There seems little doubt * * * that the conflict between the rule and § 2101 should be resolved in favor of the statute." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 387 (7th ed. 1993); see 28 U.S.C. 2071(a). Compare current Supreme Court Rule 18.1 (effective Oct. 2, 1995) (eliminating 30-day limit).

[2] Electoral changes are measured under Section 5 by comparison with voting practices in place on certain statutorily established dates. With regard to the State of Georgia, the pertinent date is November 1, 1964. See 28 C.F.R. Pt. 51, App.

District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [on account of membership in a language minority group]," or (2) it has submitted the proposed change to the Department of Justice for administrative preclearance[3] and the Department has interposed no objection to it.

1. As of November 1, 1964, 61 Superior Court judgeships existed in Georgia. J.S. App. 6. Between 1964 and 1994, Georgia created 98 additional judgeships by statute,[4] but did not submit any of those judgeships for Section 5 review until 1988. See *Brooks* v. *State Bd. of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989) (three-judge court) (ordering Georgia to submit for preclearance judgeships created since November 1, 1964), aff'd mem., 498 U.S. 916 (1990). The State submitted the post-1964 judgeships to the Department of Justice during the six-year period between 1988 and 1994. The Assistant Attorney

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[3] The Attorney General has delegated to the Assistant Attorney General for Civil Rights the authority to issue Section 5 preclearance determinations. See Department of Justice Regulations, 28 C.F.R. 51.3.

[4] Although the district court stated (J.S. App. 6) that Georgia created 77 new judgeships during the relevant time period, and the State in its Motion to Affirm (at 4) asserts that it created 88 new judgeships, the record reflects that 98 is the correct number. As the State described in its pretrial brief before the district court, 77 additional judgeships were created between 1964 and 1988, and another 21 were created between 1988 and the time of the trial in this case. State's Pretrial Br. 17; see also Motion to Affirm 4 (Georgia has increased the number of judgeships by 98, from 61 to 159).

General for Civil Rights refused to preclear 62 of the 98 additional judgeships. J.S. App. 6.

2. On August 24, 1990, Georgia filed suit in the United States District Court for the District of Columbia under Section 5, seeking judicial preclearance of the judgeships for which administrative preclearance had been denied. See 42 U.S.C. 1973c. On October 19, 1990, appellants—African-American voters within the State—sought leave to intervene as defendants in that litigation. At that time, the United States argued that appellants had no right to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, but urged the district court to grant appellants permissive intervention under Rule 24(b).[5] Gov't Dist. Ct. Br. in Response to Motion to Intervene 1-3. The State of Georgia opposed both intervention as of right and permissive intervention, arguing, *inter alia*, that the United States would adequately represent the interests of appellants. State's Dist. Ct. Br. in Opposition to Motion to Intervene 2.

On December 21, 1990, the district court denied the motion to intervene "for the reasons set forth in the Government's response and the State of Georgia's

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[5] Three-judge courts empaneled under Section 5 have routinely granted permissive intervention to minority voters affected by the electoral change at issue in the litigation. See, *e.g.*, *Bossier Parish Sch. Bd.* v. *Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994); *Texas* v. *United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992); *County Council of Sumter County* v. *United States*, 555 F. Supp. 694, 696-698 (D.D.C. 1983); *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982); see also *Commissioners Court of Medina County* v. *United States*, 683 F.2d 435, 438-439 (D.C. Cir. 1982) (attorneys' fees). But see *Apache County* v. *United States*, 256 F. Supp. 903, 906-908 (D.D.C. 1966).

opposition," but permitted appellants to participate in the litigation as *amici curiae*. *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.). The district court denied appellants' motion for reconsideration on June 7, 1991, *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.), and denied appellants' renewed motion to intervene on September 23, 1991. A footnote in the latter order noted that Judge Johnson "was disposed to grant the motion to intervene, and continues to hold that position." *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.), Order at 1 n.1.

A four-day bench trial was held in October, 1994. On February 3, 1995, the district court ruled for the State, and entered a judgment declaring that the creation of the additional judgeships did not have the purpose and would not have the effect of abridging the right to vote on account of race or color. J.S. App. 3-19. Judge Johnson dissented and reserved the right to file a separate opinion, but has not yet done so. *Id.* at 2 n.*.

On March 6, 1995, the thirtieth day after entry of the merits judgment, appellants filed a motion to intervene as defendants for purposes of appeal, together with a notice of appeal. J.S. 4; J.S. App. 20. On the same day, the United States filed a notice of appeal. J.S. App. 20. The State opposed appellants' motion for intervention. The United States took no position on the motion. *Ibid.* On April 4, 1995, the district court dismissed the motion, holding that the filing of a notice of appeal by the United States had divested the court of jurisdiction to act on matters involved in the appeal. *Id.* at 20-21.

On June 5, 1995, the United States moved, pursuant to Rule 18.5 of the Rules of this Court, voluntarily to

dismiss its appeal from the merits decision of the three-judge court. J.S. 4.

ARGUMENT

1. During the post-judgment period in which a party may take an appeal, persons who are not parties to a civil action may seek to intervene in that action for the purpose of appealing the district court's final judgment. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977); *Bryant* v. *Yellen*, 447 U.S. 352, 365-367 (1980). In this case, the district court dismissed appellants' post-judgment motion for intervention on the ground that the United States' notice of appeal deprived it of jurisdiction over the motion. J.S. App. 20-21. The United States, however, subsequently withdrew its appeal. J.S. 4. Any defect in the district court's jurisdiction has therefore been cured,[6] and there currently is no barrier to the district court's determining whether appellants may intervene for purposes of appeal. Accordingly, this Court should vacate the dismissal of appellants'

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[6] This Court has stated that "[t]he filing of a notice of appeal * * * divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). The courts of appeals are divided as to whether a motion for intervention is such an "aspect[] of the case." Compare *Roe* v. *Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990) and *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 928 (5th Cir. 1983) with *Halderman* v. *Pennhurst State Sch. & Hosp.*, 612 F.2d 131, 134 (3d Cir. 1979) (en banc); cf. *United Airlines*, 432 U.S. at 395 n.16 (citing with approval district court decision to grant intervention motion after notice of appeal was filed). Because any potential jurisdictional impediment has now been removed, the Court need not reach that question in this case.

motion and remand that issue to the district court for reconsideration in light of the United States' decision not to pursue an appeal of the underlying judgment. See, *e.g.*, *Speight* v. *Slaton*, 415 U.S. 333, 335 (1974) (per curiam) (vacating judgment of three-judge court and remanding for reconsideration in light of changed circumstances).

The case-specific nature of intervention determinations under Rule 24 of the Federal Rules of Civil Procedure counsels remand in this case. Rule 24(a)(2)[7] provides that persons may intervene as of right when "[1] [u]pon timely application * * * [2] the applicant claims an interest relating to the property or transaction which is the subject of the action and [3] the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest [and 4] the applicant's interest is [not] adequately represented by existing parties." The decision whether the movant has satisfied these requirements in a particular case requires a fact-intensive inquiry best left to the district court in the first instance. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 428 (1993) (per curiam) (denial of intervention is a "relatively factbound issue"); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court."); see also *NAACP* v. *New York*, 413 U.S. 345, 364 (1973) (noting that a "detailed recital

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[7] Appellants do not claim that they are eligible for intervention as of right under Rule 24(a)(1).

of the facts and of the history of the case is necessary because of the discretionary nature of the District Court's order [denying a motion to intervene in Section 4 litigation]").

Rule 24(b)(2) grants the district court discretion to permit intervention where the court finds that the "applicant's claim or defense and the main action have a question of law or fact in common," and that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." The district court is in a unique position to determine how the addition of new parties will affect the future course of the litigation. District court decisions granting or denying permissive intervention are therefore reviewed only for a "clear abuse" of discretion, *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142-143 (1944), and generally will be overturned only where a district court has failed to exercise its discretion due to an error of law, see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 559-560 (1974) (where district court erroneously concluded that prospective intervenors were barred by statute of limitations, court of appeals' decision remanding intervention question for further proceedings "merely directed that discretion be exercised").

Because the district court in this case believed itself to be without jurisdiction, it neither made factual findings nor exercised its discretion as to appellants' intervention motion. Moreover, the United States' subsequent decision to withdraw its appeal is relevant to whether appellants' interests are still "adequately represented" by the United States for purposes of Rule 24(a)(2), and is a factor that the district court may consider in exercising its dis-

cretion under Rule 24(b). See, *e.g.*, *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471, 1478 & n.2 (11th Cir. 1993); *Yniguez* v. *Arizona*, 939 F.2d 727, 737-738 (9th Cir. 1991); *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Triax Co.* v. *TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984); *United States* v. *AT&T*, 642 F.2d 1285, 1293-1294 (D.C. Cir. 1980). In light of these considerations, we believe the Court should vacate the district court's judgment dismissing appellants' motion to intervene and remand for reconsideration in light of the subsequent change in circumstances. See generally *Speight* v. *Slaton*, *supra*.

2. Because appellants have never been made parties to this case, they may not currently appeal the merits of the underlying judgment. It is well established that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); accord *Karcher* v. *May*, 484 U.S. 72, 77 (1987). Appellants' appeal from the district court's judgment on the merits should therefore be dismissed.[8]

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[8] The question of intervention is jurisdictionally independent of the underlying merits for purposes of appeal. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688 (1961) (failure to appeal merits did not make appeal of denial of intervention moot). Should the district court on remand grant appellants intervenor status, that court will likely have to consider the question whether that status should relate back to appellants' March 6, 1995, notice of appeal. Cf. *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 406-407 n.11 (1980) ("We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the

CONCLUSION

The judgment of the district court denying appellants' motion for intervention should be vacated, and the case should be remanded for further proceedings in light of the United States' withdrawal of its appeal. Appellants' appeal from the district court's merits decision should be dismissed.

Respectfully submitted.

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OCTOBER 1995

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date of the original denial."); *Linton by Arnold* v. *Commissioner of Health & Environment*, 30 F.3d 55, 56 (6th Cir. 1994). But cf. *FEC* v. *NRA Political Victory Fund*, 115 S. Ct. 537, 543-544 (1994) (rejecting relation back doctrine in jurisdictional context). Alternatively, the district court may elect to take other steps to permit a timely notice of appeal to be filed. Cf. 16 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3950, at 599 (Supp. 1995) (district court has power in "exceptional circumstances" under Fed. R. Civ. P. 60(b) to vacate judgment for the purpose of establishing opportunity to file a timely notice of appeal). In any event, the district court is in the best position to determine, in the first instance, the appropriate procedural course.

No. 95-177

(4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court For The District of Columbia (Three Judge Court)

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ARGUMENT

I. Denial of Intervention Was Error

A. Representation Is not Adequate.

The state argues that intervention was properly denied because the United States adequately represented the interests of appellants at trial. Motion to Affirm, p. 19. Assuming that to be true, it is also irrelevant. The issue presented in this appeal is whether the district court properly denied appellants' motion to intervene for purposes of pursuing an appeal. Given the fact that the United States dismissed its appeal it cannot in logic or law be said that the United States is adequately representing appellants' interests at the present time.

B. Effective Enforcement of Section 5 Depends on Participation by Private Parties.

The state is also in error in arguing that private parties have no appropriate role in Section 5 enforcement. The availability of a private cause of action to enforce the Voting Rights Act, as well as the practical need for private enforcement, are well established.

In *Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969), the Court expressly held that a private cause of action exists to enforce Section 5. In doing so, the Court noted that vesting sole enforcement authority in the Attorney General would perpetuate the problem of inadequate enforcement the Act was designed to ameliorate: "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. The guarantees of Section 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557.

Congress has amended the Voting Rights Act post-*Allen* and has expressly endorsed private enforcement. *See* H.R. Rep. No. 397, 91st Cong., 2d Sess. 8 (1970) (endorsing *Allen* and approving "the need for private policing"); S. Rep. No. 295, 94th Cong., 1st Sess. 39-41 (1975) ("Congress depends heavily upon private citizens to enforce the fundamental rights involved"); S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, 30 (1982) ("reiterat[ing] the existence of the private right of action . . . as has been clearly intended by Congress since 1965").

Private enforcement has proved indispensable to the effective implementation of the Act. From July 1, 1976 to September 30, 1993 a total of 3,656 voting cases were filed in federal district court. Annual Reports of the Director of the Administrative Office of the United States Courts, 1977-1993, Table C-2. Of these, the United States was a plaintiff in only 174 (4.8%). *See* Chandler Davidson & Bernard Grofman, "The Voting Rights Act and the Second Reconstruction," in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* 385 (Davidson & Grofman eds., 1994) (one of the most notable features of the Act "is its encouragement of the private bar to take a major role in enforcing public voting rights law"). The state's reliance on *Morris v. Gresette*, 432 U.S. 491 (1977), is misplaced. *Morris* did not address the issue of private enforcement of the Act at all. It held only that the decision of the Attorney General in preclearing a voting change cannot be judicially reviewed. *Id.* at 507. That is not an issue in this appeal.

C. Failure to Appeal by the United States Does not Foreclose Appeal by a Private Party.

The state argues incorrectly that the decision of the United States not to pursue its appeal is tantamount to granting Section 5 preclearance and precludes appeal by a private party. First, the Attorney General has objected to the proposed changes, and that objection has not been withdrawn.

Second, appellants are not appealing the decision of the United States not to appeal, but the decision of the three judge court denying intervention and granting preclearance. Such an appeal is authorized by the Voting Rights Act. *See* 42 U.S.C. § 1973c.

The decision in *NAACP v. New York*, 413 U.S. 345 (1973), is dispositive of the question of the jurisdiction of the Court over this appeal. In *NAACP* the three judge court, with the consent of the United States, entered judgment for the state of New York in a bailout action under Section 4(a) of the Voting Rights Act. In the same order, the court denied the motion of the NAACP for leave to intervene. The Supreme Court held that it "had jurisdiction, on direct appeal . . . to determine whether the District Court erred in denying the motion to intervene." 413 U.S. at 356. There is no basis for treating differently an unsuccessful intervenor under the parallel provisions of Section 5 of the Act.

Third, the decision of the United States not to appeal a determination under Section 5 is simply that – a decision not to appeal. But that decision, as *NAACP v. New York* makes clear even where the United States actually consented to judgment, is not dispositive of the question whether the rulings of the district court were right or wrong. Those questions can only be answered by this Court. *See Blanding v. DuBose*, 454 U.S. 393, 401 (1982), and *County Council of Sumter County South Carolina v. United States*, 555 F.Supp. 694, 696 (D.D.C. 1983) (granting relief to private appellants in a Section 5 enforcement action despite the failure of the United States to appeal the adverse decision of a three judge court).

D. Section 2 Is no Bar to an Appeal.

The state argues that the lower court should be affirmed because appellants can pursue a challenge to the disputed voting practices under Section 2 of the Voting Rights Act. But that would exactly reverse the procedure for enforcing voting rights established by Congress.

Congress concluded in 1965 that the case-by-case litigation method of enforcing voting rights embodied in the Civil Rights Acts of 1957, 1960, and 1964 had not remedied the problem in a timely or effective manner. *See South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) ("these new laws have done little to cure the problem of voting discrimination"). Accordingly, in enacting Section 5 Congress adopted a new approach that would provide "an expeditious and effective review" of proposed changes in voting. S. Rep. No. 97-417, *supra*, at 6.

Section 5, which creates "in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect," *McCain v. Lybrand*, 465 U.S. 236, 256 (1984), was designed "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." *South Carolina v. Katzenbach, supra*, 383 U.S. at 328, 335. The burden shifting of Section 5 has been consistently sustained by the Court for the reasons articulated in *Katzenbach*. *See City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980); *Georgia v. United States*, 411 U.S. 526, 538 n.9 (1973) ("[r]ather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect").

Taking the state's argument to its logical conclusion, minority plaintiffs would never be able to seek enforcement of Section 5 because they could always bring a Section 2 action. Such a ruling would radically alter Section 5. Indeed, a three judge court rejected a similar claim by the state in an earlier related phase of this case. *See Brooks v. State Board of Elections*, Civ. No. CV 288-146 (S.D.Ga. June 27, 1989), slip. op. at 1 ("[i]t is appropriate to decide such section 5 issues before the district court considers the section 2 claims").

E. The Notice of Appeal Was Timely.

Appellants filed their motion to intervene and notice of appeal within the time for filing a notice of appeal by the United States. For that reason the notice of appeal was timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (motion by a non-party to intervene for the purpose of appealing is timely if filed "within the time period" in which a named party could appeal).

The cases relied upon by the state are inapposite. In *Moten v. Bricklayers, Masons and Plasterers*, 543 F.2d 224, 227 (D.C.Cir. 1976), appellants never even sought to intervene as parties. In *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), the court held, not surprisingly, that a motion to intervene filed some 20 years after the litigation had begun and after four years of "complex and delicately balanced" negotiations was untimely. Here, both the motion to intervene and the notice of appeal were timely.[1]

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[1] It is not necessary to vacate and remand for further consideration in light of the United States withdrawal of its appeal as the Solicitor General has suggested. Motion to Vacate and Dismiss, p. 10. Should this Court determine that intervention was improperly denied, a determination which it has jurisdiction to make, NAACP v. New York, *supra*, 413 U.S. at 356, appellants should be treated as parties for purposes of appealing the decision of the three judge court. Intervenors who "properly become parties, may appeal an adverse judgment." Marino v. Ortiz, 484 U.S. 301, 304 (1988). *See* Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1480 n.3 (11th Cir. 1993) ("[b]ecause we conclude that the district court improperly denied intervention, the intervenors are now parties for purposes of appealing the district court's findings and the injunction").

II. The Evidence of Racial Purpose Is Essentially Unrefuted

The state does not deny that the district court failed to consider any of the evidence of racial purpose in the adoption of the majority vote requirement used in the election of superior court judges. Nor does the state attempt directly to refute that evidence. Instead, it chooses essentially to ignore it.

In the most general and conclusory manner, the state says that the purpose behind adoption of the majority vote law "is radically different than what Appellants present in their Jurisdictional Statement." Motion to Affirm, p. 17. But the state does not deny the evidence showing that a majority vote bill was first introduced in the general assembly by Rep. Denmark Groover, that his stated purpose was to dilute "Negro bloc voting," that the Groover bill was adopted overwhelmingly by the house, that Groover subsequently made racial appeals in support of the bill before the senate rules committee, that the Election Law Study Committee proposed adoption of a majority vote requirement along with other measures that were admittedly intended to dilute minority voting strength (*e.g.*, a literacy test for voting), and that the general assembly enacted a discriminatory literacy test at the same time it adopted the majority vote requirement. Nor does the state undermine the testimony of Senator Leroy Johnson and Representative James Mackay that the general assembly passed the majority vote bill for the express purpose of diluting the voting strength of black voters.

The state argues that the majority vote requirement was part of a good government reform effort of the administration of Governor Carl Sanders to revise the state's election code. This argument overlooks the fact that the 1964 law was passed by the general assembly, and not a separate entity known as "the Sanders administration."

In addition, Governor Sanders, while a moderate given prevailing racial views, was still a Georgia politician. He could never have been elected to statewide office had he been as "liberal" on issues of race, or simply unconcerned about them, as the state claims. In his first term in the Georgia house in 1955, Sanders voted for a number of overtly racial measures, *e.g.*, a bill authorizing the governor to close the public schools to avoid integration, a resolution condemning the *Brown* decision as "null, void, and of no effect," a bill sponsored by Groover requiring segregation in common carriers, a bill authorizing the state police to enforce segregation laws, and a bill allowing public parks to be sold to private parties rather than be integrated. Georgia House Journal (1956), 365-566, 782-93, 656, 1366-67.

When he became president *pro tem* of the senate in 1959, Sanders sponsored bills to allow the governor to close public schools and universities, and to rewrite the admissions policies of the University of Georgia. Georgia Senate Journal (1959), 65-7. He sponsored other anti-integration bills in 1960. Ga. Laws 1960, 1135-37. In 1961 he sponsored a bill to provide tuition grants to students who attended private schools and voted to repeal compulsory education laws. DT, Kousser at 60. When he ran for governor in 1962, Sanders acknowledged in his platform that:

> My record in support of legislation over the years to maintain segregation is long, continuing, and well-known. It is not one of empty oratory, but concrete results . . . . As your governor, every legal means and every lawful recourse available will be utilized to the fullest to strengthen and to maintain Georgia's traditional separation, sponsored by the responsible leadership of the state, and passed almost unanimously by the General Assembly.

DT, Kousser at 61.

As governor-elect, Sanders also led an unsuccessful effort in the general assembly to require at-large elections for senate seats in Fulton county where a single member format, required by the state constitution, would allow for the election of a black to the all-white senate. In 1964, when Congress was considering passage of a public accommodations law, Sanders testified against the bill on the grounds that it would violate private property and state's rights. DT, Kousser at 63-7.

The argument that the majority vote requirement was not adopted with a racially discriminatory purpose because it was part of a revision of the code favored by the Sanders administration is inadequate to overcome the direct evidence of racial purpose in this case. It was error for the district court to refuse to consider that evidence.[2]

A. Retrogression Is not the Issue.

In an effort to dodge the evidence of racial purpose, the state argues that the method of electing judges is free of "discrimination" because it has no retrogressive effect.[3]

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[2] Following the state's request for reconsideration, the Attorney General precleared Georgia's new law abolishing the majority vote requirement and establishing a 45% plurality requirement for most general elections on September 11, 1995. Letter to Michael J. Bowers, Attorney General of Georgia, from Loretta King, Acting Assistant Attorney General, Sept. 11, 1995. Although the act of the legislature in 1994 doesn't shed light on the racial purpose of the legislature in 1964, it undercuts the post-hoc argument that the state "could not reasonably have done otherwise" than adopt a majority vote requirement. Motion to Affirm, p. 18. But for its desire to dilute minority voting strength, it could have adopted a plurality vote requirement.

[3] As appellants noted, there was evidence of adverse racial effect, *e.g.*, the impact of the majority vote requirement on the outcome of elections and in discouraging blacks from running for office. J.S. 10, 14.

The argument of no racial effect is based in turn on the proportionately fewer black lawyers in the state, which the state contends is "the crux of this case." Motion to Affirm, p. 6.

The state's argument fails for several reasons. Section 5 contains a purpose as well as an effect standard for determining "discrimination." The mere fact that a voting practice may not be retrogressive is not dispositive. As the Court indicated in *Johnson v. De Grandy*, 114 S.Ct. 2647, 2661 (1994), citing *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975), a voting practice "aimed at diluting black votes [is] forbidden by § 5, regardless of its effect."

In addition, the state's argument confuses minority lawyers with minority voters. This is not an action under Title VII of the Civil Rights Act of 1964 brought by lawyers claiming that they have not been selected as judges in sufficient numbers. Instead, this is a voting rights case in which appellants contend that minority voters have been subjected to invidious discrimination.

Moreover, given the fact that the state has discriminated against blacks in education and admission to the bar, it would reward the state for its misconduct to allow it to defend its discriminatory voting practices on the grounds that there were few black lawyers in the state. Such a defense has as much merit as the plea of one convicted of murdering his parents that the court show mercy because she is an orphan. The real crux of this case is the lower court's failure to give *any* consideration to the evidence of purposeful discrimination in the method of electing judges in Georgia.

The state is wrong in claiming that appellants seek "the repeal" of the majority vote requirement or that the state change any of its practices or statutes in effect prior to November 1, 1964. Motion to Affirm, pp. 10, 14. Appellants merely seek a ruling that voting changes enacted after the effective date of Section 5 not be implemented where they are infected with a racially discriminatory

purpose. That is one of the things Section 5 was expressly designed to accomplish. *Beer v. United States*, 425 U.S. 130, 141 (1976); *Johnson v. De Grandy, supra*, 114 S.Ct. at 2661 (purposeful discrimination is forbidden by Section 5).

The state also errs in saying that the disputed changes did "one thing only," *i.e.*, added seats to the superior court. Motion to Affirm, p. 16. To the contrary, the changes also provided for a method of electing the added judgeships.[4] That method of election cannot be shielded from Section 5 review.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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[4] More than 50 of the 60 statutes incorporated by express reference the at-large, majority vote and designated post method of elections. J.S. 10.